

# **UNIVERSITY OF CAPE TOWN**

**Faculty of Law – School for Advanced Legal Studies**

## **Reflections on Disability: Perspectives on South Africa, India and the United States of America**

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I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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## 1. Introduction

The number of people with disabilities in the world today is growing: It is estimated that 500 million people are disabled. In most countries at least one out of ten persons has a Physical, mental or sensory impairment and at least 25 percent of any population is adversely affected by the presence of disability.<sup>1</sup>

The causes of impairments vary throughout the world, as do the prevalence and consequences of disability. These variations are the result of different socio-economic circumstances and of the different provisions that each society makes for the well-being of its members.<sup>2</sup>

In developing countries, it is estimated that 80 per cent of all disabled persons live in isolated rural areas. Disabled persons are extremely poor and the problem is exacerbated because they often live in areas where medical and related services are scarce and in most cases absent. In most developing countries resources are not sufficient to prevent or detect disabilities, and to meet the rehabilitation and supportive needs of the disabled population.<sup>3</sup>

In developed countries disabled people claim independent living resources to maximize individual choice and to escape from segregated welfare institutions. In developing countries however, survival often comes before issues of equality.<sup>4</sup>

According to the World Bank disability limits access to education and employment and leads to economic and social exclusion therefore poor people with disabilities are caught in a vicious cycle of poverty and disability.<sup>5</sup>

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<sup>1</sup> [www.dpsa.org.za/forum/discuss.asp](http://www.dpsa.org.za/forum/discuss.asp) accessed at 12/18/2005

<sup>2</sup> supra

<sup>3</sup> supra

<sup>4</sup> Priestley M 'Thinking Global: Challenges to Disability Studies' *Centre for Disability Studies, University of Leeds, and Leeds LS29JT UK*. [www.leeds.ac.uk/disability-studies](http://www.leeds.ac.uk/disability-studies).

<sup>5</sup> Anazonwu S 'Disability, poverty and Development' UK Department for International Development (DFID) Report-February 2000 (Reprinted in World Hospitals & Health Services. Vol 38 No 1. IHF Official

There are many factors responsible for the increased number of disabled persons and their isolation from society. These include; populations with a high proportion of illiteracy, little awareness of basic social services or of health and education measures, an absence of accurate knowledge about disability and its causes, prevention and treatment. Other problems are stigma, discrimination and misconceived ideas about disability, inadequate programmes primary health care and services, a high proportion of overburdened and impoverished families and overcrowded, unhealthy housing and living conditions. In addition, wars and the consequences of wars, other forms of violence and destruction, poverty, hunger, epidemics and major shifts in population to add to the problem. There are also geographical distances and physical and social barriers that make it impossible for many people to take advantage of available services.<sup>6</sup>

### **1.1 An overview of disability**

Disability is an outcome of complex interactions between the functional limitations arising from a person's physical intellectual or mental condition and the social and physical environment. It has multiple dimensions and far more than an individual health or medical problems.<sup>7</sup>

From a human rights perspective, the experience of persons with disabilities must be incorporated into contemporary human rights interpretation of law for it to be empowering for all.<sup>8</sup> This will enable people with disabilities to become more visible by articulating their human rights and communicating their experiences, so that the existing human rights ideas and practices will take their lives into account. This will entail a shift

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Journal. Available at [http://www.hospitalmanagement.net/Infdocs/world\\_Hospital\\_article/disability.pdf](http://www.hospitalmanagement.net/Infdocs/world_Hospital_article/disability.pdf) accessed 25<sup>th</sup> nov 2006

<sup>6</sup> White paper on Integrated National Disability Strategy Office of the President (1997). Available [www.independentliving.org/docs5/SA\\_NAT1Disstrat1.html](http://www.independentliving.org/docs5/SA_NAT1Disstrat1.html).

<sup>7</sup> Anazonwu (n 5)

<sup>8</sup> A White Paper Understanding the Role of an International Convention on the Human Rights of people with Disabilities. An analysis of the legal, social, and practical implications for policy makers and disability and human rights advocates in the United States National Council on Disability June 12, 2002. Available at [www.ncd.gov/newsroom/publications/pdf/unwhitepaper.pdf](http://www.ncd.gov/newsroom/publications/pdf/unwhitepaper.pdf) accessed on the 23<sup>rd</sup> Nov 2005

from the perception that people with disabilities are recipients of charity to a perception of them as active claimants of human rights.<sup>9</sup>

Grounded in basic concepts of justice and human dignity, human rights enable people to know their rights and claim them respectively.<sup>10</sup> The human rights approach has the power to transform the needs of people with disabilities into rights they can claim.

The frame work of human rights is important because it is useful in efforts to lobby for legislation and policies and to provide an important tool for grassroots groups to organize around disability issues. Thus, by framing their concerns in human rights terms, disability advocates gain access to important decision-makers within the international human rights system as well as to national and local officials.<sup>11</sup>

The human rights frame work that embraces the social model of disability has a greater capacity to identify and resolve those fundamental aspects of society that continue to oppress and exclude people with disabilities.<sup>12</sup>

## **1.2 The trends of disability**

The first quota levy systems started in the Post-First World War period, and covered only disabled veterans. The quotas were based on the idea that society owed a duty to those who had been disabled while serving their country and by the end of 1923 the whole of Europe had adopted such systems.<sup>13</sup> The high unemployment among the disabled persons during the inter-war years, and the lack of success of the voluntary approach led most European countries to turn to the quota system in the post-second world war period.<sup>14</sup>

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<sup>9</sup> Supra

<sup>10</sup> National Council on Disability (n 8) at 30.

<sup>11</sup> National Council on Disability (n 8) at 30.

<sup>12</sup> Bickenbach (n-73) cited in (n-8) at 29.

<sup>13</sup> Waddington L 'Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination laws' (1996-1997) *18 Comparative Labour Law Journal* at 62. Available at <http://web.lexis-nexis.com/professional/>

<sup>14</sup> Supra

The aim of the quota system in Europe was to promote the employment of disabled persons, based on the belief that without some form of legislative intervention, disabled persons would not meet the required quota of the employable work force. The European quota system only demonstrated that an employment system based on the idea that the protected groups of workers were inferior and could not achieve permanent and significant success, since employers would attempt to evade their obligations to employ such workers.<sup>15</sup>

Employment strategies for people with disabilities emerged in the 1920s and 1930s. During this early period most of Europe tended to favour the quota levy system while countries like the United States, Canada, and Sweden tended to favour vocational rehabilitation and training strategies.<sup>16</sup> The disability rights movement of the 1960s and 1970s tended to consist of disconnected combination of modern inclusive approaches, elements of rehabilitation, special education and custodial care approaches of the past.<sup>17</sup>

Developing countries tended to adopt disability systems on a small scale: rehabilitation education, training and sheltered educational programmes imported from industrialized countries. Thus, due to the high costs such programmes never reached the relevant population. Developing countries are beginning to replace these imported projects with approaches better suited to their social and economic Conditions.<sup>18</sup> Community based rehabilitation tends to empower, educate and provide employment opportunities for people with disabilities.<sup>19</sup>

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<sup>15</sup> Waddington (n 13) at 62

<sup>16</sup> Waddington (n 13) at 62

<sup>17</sup> Metts RL 'Disability Issues, Trends and Recommendations for the World Bank' 2000 Social

protection Discussion paper no.0007 Available at

[http://wbln0018.worldbank.org/HDNet/hddocs.nsf/0/35b617877b6d80c8852568b0004fed6d/\\$FILE/0007.pdf](http://wbln0018.worldbank.org/HDNet/hddocs.nsf/0/35b617877b6d80c8852568b0004fed6d/$FILE/0007.pdf) accessed 02-03-2006

<sup>18</sup> Supra

<sup>19</sup> Supra

### 1.3 The Alternative Approach

Anti-discrimination legislation is based on the assumption that disabled workers are as good as their non-disabled counterparts and thus given the appropriate environment, are able to successfully compete for jobs on their merits. Anti-discrimination legislation has long been used to promote the employment of and equal pay for people in Europe. This approach has been adopted by many countries including India, South Africa and the United States of America.<sup>20</sup>

The United States of America was one of the first countries to adopt disability anti-discrimination legislation. The Civil Rights Act of 1964 prohibited discrimination on the grounds of race, colour, religion, sex and national origin.<sup>21</sup> The disability activists responded by campaigning for the adoption of anti-discrimination disability laws. Thus the Rehabilitation Act was enacted to eliminate employment discrimination. The disability activists lobbied further for the implementation of anti-discrimination requirements to employers in the private sector. This resulted in the enactment of the Americans with disabilities Act (ADA) in 1990.<sup>22</sup>

### 1.4 The future of disability law: from Anti-discrimination law to social-welfare law

The anti-discrimination model faces challenges in respect of its ability to integrate people with disabilities and to improve employment prospects. People with disabilities will not be able to form part of the workplace unless the law addresses deep-rooted barriers that prevent them from being employed. There is need to recognize the importance of social-welfare interventions to address the deep-rooted barriers to employment of people with disabilities.<sup>23</sup>

The return to social welfare strategies to enhance employment must be done with caution as it has been criticized in the past. The opposition to social –welfare law was reflected in the preference for disability rights activists in the 1970s and 1980s in the United States.

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<sup>21</sup> Bagenstos S R 'Comparative Disability Employment from an American Perspective' (2002-2003) 24 *Comparative Labour Law of policy Journal* at 649. Available at [www.heinonline.org](http://www.heinonline.org).

<sup>22</sup> Supra

<sup>23</sup> Bagenstos S R 'The Future of Disability Law' 2004 Vol. 114. *Yale Law Journal* at 1



Disability rights activists need to identify ways of reconstructing disability welfare systems to avoid paternalism, arbitrariness and oppression.<sup>24</sup>

### **1.5. An Overview of the existing international legal frameworks on Disability**

All international human rights instruments protect the rights of people with disabilities through the principles of equality and non-discrimination. The instruments that are explicitly concerned with people with disabilities include the Universal Declaration of Human Rights (article 25 deals with the right to adequate standard of living), the Convention on the Rights of Children (article 23), the African Charter of Human and Peoples' Rights Article 18 (4), and the International Covenant on Economics, Social and Cultural Rights.<sup>25</sup>

All the above treaties are binding on state parties. The Universal Declaration on Human Rights, with the principle of non-discrimination, has become part of the customary international law binding all states whether or not the state has ratified the treaty in which a particular guarantee also appears.<sup>26</sup>

The United Nations also developed standard rules on the equalization of opportunities for persons with disabilities based on the United Nations Decade on Disabled Persons (1983-1992). The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women, as well as the World Programme Action concerning Disabled persons, constitute the political and moral foundations of the standard rules.<sup>27</sup>

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<sup>24</sup>Supra

<sup>25</sup> Report of the United Nations Consultative Expert Group Meeting on International Norms and Standards Relating to Disability 8-12 December 1998

<sup>26</sup> Supra

<sup>27</sup> Standard Rules on the Equalization of Opportunities For Persons with Disabilities 85<sup>th</sup> Plenary Meeting, 20 December 1993

The purpose of the standard rules for people with disabilities is to ensure that as members of society they may exercise the same rights and obligations. Many societies still have obstacles preventing persons with disabilities from exercising their rights and freedom, hence making it difficult for them to participate fully in societal activities.

Equalizing opportunities through the standard rules is an essential part in the world wide effort to mobilize human resources.<sup>28</sup>

The International Labour Organization recognizes the need to address the discrimination and exclusion of disabled persons. The ILO has enacted recommendations and conventions to curb discrimination against disabled persons at work with a view to providing more employment opportunities and an improved employment environment.

The ILO has also instituted a number of programmes with the aim of raising employer awareness of disabled persons and to increase the employer's confidence in having disabled persons as part of his work force. The ILO approach is based on the principle of equal opportunity, equal treatment, non-discrimination and mainstreaming. These principles are highlighted in the ILO Convention 159 Concerning Vocational Rehabilitation and Employment (Disabled Persons), Convention no.159 of 1983.

This convention clearly states in Articles 1 and 2 that a disabled person is a person whose prospects of securing a job are reduced as a result of his physical or mental impairment. It is also of the view that each member state should consider the purpose of vocational rehabilitation as a way to retain and advance the employment of a disabled person in society.<sup>29</sup> The convention is accompanied by a recommendation concerning vocational rehabilitation and employment (Disabled persons) Recommendation No. 168 (1983).

The aim of this paper is to reflect on disability and social protection in three jurisdictions. A country like the United States has developed its disability law and has implemented

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<sup>28</sup> Supra (n 27)

<sup>29</sup> Degener T 'Disabled persons and Human rights: The Legal Frame work': *Human Rights and Disabled Persons: essays and relevant Human Rights Instruments* (1995) vol.40. Kluwer Academic publishers at 1

legislation to protect the disabled. It has for long advocated the shift from welfare to direct-rights system for disabled persons.

However, many disability activists are returning to the social-welfare interventionist system to remove the deep-rooted barriers faced by disabled persons in the United States of America.

I have chosen South Africa and India as other comparative countries because in these countries the concept of disability is fairly new. The highest percentages of disabled persons in both countries are mostly found in the rural areas. The majority of disabled persons depend on disability grants as their only means of survival, while countries like the United States have a totally different approach to disability for example striving for independent living or integration of disabled people.

Both South Africa and India have enacted legislations to protect and support disabled persons. There are many challenges to implementing policies that would reach disabled people in the rural areas. South Africa and India have to learn some valuable lessons that are best suited for their particular country. India uses the ILO Community Based Rehabilitation (CBR) to empower, educate provide employment opportunities for people with disabilities. In the case of South Africa, the Integrated National Strategy states that the CBR should form the basis of the national Rehabilitation strategy.

Section 1 provides an overview of the concept of disability. The background and trend disability has taken from the post-war period, which provided quota systems for the war veterans who were disabled by war to the alternative approach of anti-discrimination. The section will also discuss disability as a human rights issue and will give an overview of international organizations implementing the rights of disabled persons.

Section 2 will deal with the definition and prevalence of disability in South Africa. It also discusses the fragmented nature of disability and the legal frame work to support and protect disabled persons, and the challenges and problems faced in implementing policies

to protect disabled people. This Section will also look at legislation that has been enacted to include people with disabilities.

Section 3 will deal the definition and prevalence of disability in India. In India has approximately 5 to 6 percent of its total population is disabled. This Section will discuss the legal framework that has been enacted to support and protect disabled persons. It will also deal with the challenges faced in the implementation and monitoring of disability policies in India.

Section 4 will deal with disability in the United States. The United States has very strong advocates for disability rights. This chapter will deal with the legal framework that has been enacted to protect the disabled persons. It will also look at the disability benefit systems and the challenges they face. Finally the section will discuss the conflict that exists between the Americans with Disabilities Act (ADA) and the Social Security Disability Insurance (SSDI)

Sections 5 and 6 will deal with the conclusion recommendations respectively.

## 2. SOUTH AFRICA

Historically, people with disabilities have constituted minorities that have been the object of unfair discrimination and stigmatization. People with disabilities suffer indignity, wide spread discrimination and lack of economic independence. The vast majority of people with disabilities in South Africa have been excluded from education, housing, transport, employment, information and community life. They have been prevented from exercising fundamental political, economic, cultural and developmental rights.<sup>30</sup> The inequality between the able-bodied and the disabled was reinforced by the injustice of the apartheid system. The laws during the apartheid regime supported the cumulative isolation of people with disabilities. These injustices continue to be perpetuated by prejudices that see people with disabilities as dependent and in need of care.<sup>31</sup>

Thus, with all these injustices the disability activists in South Africa emerged during the 1980s as part of the boarder liberation struggle against apartheid. The Disabled People of South Africa (DPSA) advocated for the mobilization of people with disabilities to resist oppression on the basis of race and disability. In the early 1990s DPSA negotiated with the African National Congress for the self –representation of people with disabilities. The DPSA negotiations with the ANC led to the deployment of disability rights activists in key government positions when the party came to power in 1994. The government ultimately ensured that disability was included in human rights, and development policies rather than using the welfare approach.<sup>32</sup> Disabled activists were deployed in strategic positions in parliament, the National Council of parliament, provincial legislatures, the South African Human Rights Commission, South African Broadcasting Corporation, National Development Agency, public service commission, national economic development and the labour council.<sup>33</sup>

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<sup>30</sup> SAHRC (2002) '*Towards a barrier-free society*' South African Human Rights Commission. Available at [www.sahrc.org.za/towards\\_barrier-free\\_society.pdf](http://www.sahrc.org.za/towards_barrier-free_society.pdf) accessed 2<sup>nd</sup> march 2006.

<sup>31</sup> Supra.

<sup>32</sup> Supra.

<sup>33</sup> Supra.

Disability is a major impediment to the realization of equal opportunities in South Africa and elsewhere.<sup>34</sup> As the need to understand the prevalence of disability in South Africa continued the United Nations Development programme (UNDP) and the Central Statistical service (CSS) provided some insights into the problem. The UNDP estimated in 1990 that the world's population experiencing severe disability came to about 5.2%. The figure in South Africa stood at approximately 5% in 1995. In 1996 the census indicated that 6.7% of the population was disabled. The National Survey on Disability provided an age-weighted count of 5.9% of the population as being disabled.<sup>35</sup> The Census 2001 provided another opportunity to ascertain the number of disabled persons, their demographics, socio-economic characteristics and their access to basic services. South Africa has differing disability and prevalence rates which would be attributed to problems relating to defining disability and assessment of procedure and criteria. The higher levels of disability prevalence can be seen to exist in rural areas.<sup>36</sup>

In South Africa, there is a lack of high -level co-operation between departments, social workers and primary health care institutions, and yet prevention and rehabilitation require co-operation. This is evident in the range of definitions of disability and incapacity found in legislative instruments. The White Paper on the Integrated National Disability Strategy recognizes the fragmented nature of the manner in which disability is addressed. It presses for social integration in all planning and policy making. The definition of disability defers from province to province. In certain provinces, only parents with disabled children receive grants, whilst in other provinces it is any type of disability that would render a parent eligible for the grant.<sup>37</sup>

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<sup>34</sup> Ngwena C 'Equality for People with disabilities in the Workplace: An Overview of the emergence of disability as a human rights issue'. (2004) 29 (2) *Journal for Juridical Science* at 167-197.

<sup>35</sup> Census 2001 'Prevalence of Disability in South Africa' at 6. Available at <http://www.statssa.gov.za/publications> /Report accessed on 9<sup>th</sup> Oct 2005.

<sup>36</sup> Olivier et al *Social Security; A legal Analysis* 1<sup>st</sup> Edition 2003.

<sup>37</sup> Degener (n 29)at 1.

The Census 2001 indicates that there 2,255,982 people with various forms of disability. This number constituted 5 per cent of the total population enumerated in the census. Of this number 1,854,376 were black, 169,678 colored, 41,235 Indian/Asian and 191,693 white. The above statistics show the urgent need to deploy preventative and rehabilitative programmes to target disabled persons.<sup>38</sup> It is encouraging to note that the integrated disability strategy emphasizes that attainment of a good and equitable quality of life for disabled persons must be included in all policies, plans, programmes and strategies aimed at enhancing the quality of life of all disabled persons in all sectors and government institutions.<sup>39</sup>

### **2.1. Definition of disability**

Disability has for a long time predominately been regarded as a health and welfare issue and state intervention has been channeled through welfare institutions. The medical model meant that organizations for people with disabilities were usually controlled by people who provided services to people with disabilities.<sup>40</sup> The main focus of the medical model is on the nature of impairment. This implied that all interventions were based on assessment, diagnosis and labelling.<sup>41</sup>

The social model is based on the belief that, circumstances of people with disabilities and the discrimination are socially created and have little to do with their impairments. It emphasizes on the shortcomings of society, in respect to disability, abilities and capabilities of people with disabilities.<sup>42</sup>

South Africa is more inclined to the social model where the ultimate impairment is a social. The shift from the medical to the social model, has come about largely through the development of strong organizations of disabled people such (Disabled People's Organization) DPO. Central to the social model of disability is the principle of self-

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<sup>38</sup> Supra (n 35) 2

<sup>39</sup> Supra (n 35) 5

<sup>40</sup> White paper on Integrated National Disability Strategy 1997.

<sup>41</sup> supra

<sup>42</sup> supra

representation by people with disabilities through like the Disabled People International (DPI) and the South African Federal Council on Disability (SAFCD).<sup>43</sup>

## **2.2. Legal Frame works in Support of Disabled persons in South Africa**

The legislation and policy concerning people with disabilities in South Africa should be looked in the political social and historical context. In 1992, DPSA launched the Disability Rights Charter of South Africa after long consultations with disability activists and their organizations. The charter asserts the rights of disabled people to live independently in an environment free of discrimination and exploitation.<sup>44</sup> In 2000, the South African Declaration on the United Nations African Decade for Disabled People recognized that people with disabilities continue to live in conditions of extreme poverty. It re-affirmed the importance of self-representation by people with disabilities and the inclusion of disabled persons in society.<sup>45</sup>

### **2.2.1. Constitution of the Republic of South Africa**

The constitution has the obligation to protect people with disabilities. The constitution imposes the duty to amend the discriminatory legislation of the past to ensure the protection of people with disabilities. The Constitution,<sup>46</sup> the supreme law of the land in South Africa prohibits discrimination against disabled people. Section 9 provides that everyone is equal before the law and has the right to equal protection and benefit of the law.

There are two approaches to equality -formal and substantive. Formal equality subscribes to the liberal notion of similarly placed persons and that an application of the law in accordance with standards of strict neutrality is the best approach to preference or prejudice.<sup>47</sup> The Constitutional court applied the substantive equality in the case of *The President of the Republic of South Africa vs. Hugo*.<sup>48</sup> It was held that the need for the development of the concept of unfair discrimination recognizes that although society

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<sup>43</sup>White Paper on Integrated National Disability Strategy 1997.

<sup>44</sup>SAHRC 2002 (n 30) at 22

<sup>45</sup> SAHRC 2002( n 30) at 22

<sup>46</sup> Act 108 of 1996

<sup>47</sup> Pretorius et al *Employment Equity Law 2001*.

<sup>48</sup> 1997 6 BCLR 9(CC).



aims to afford each human being equal treatment on the basis of dignity and self worth, that goal cannot be achieved by insisting on identical treatment in all circumstances.

Section 27 deals with the right to access to social security. Section 7 states that the state has the duty to protect, promote, realize and fulfill the rights in the Bill of Rights. It also places a powerful obligation on private institutions to recognize the rights of people with disabilities as far as the nature of the right and the nature of duty respectively. Coupled with the above are other human rights that enhance the social security protection of people with disabilities such as the right to access to housing and children's rights to shelter, social security and medical treatment.

In restructuring the South Africa society and labour market, the difficulties and challenges facing the disabled persons must not be neglected. The development of rights and affirmative action to mainstream workers with disabilities must be regarded as an integral part of a strategy to redress inequality as part of a strategy to improve overall productivity and labour market efficiency.<sup>49</sup>

### **2.2.2. Employment Equity Act**

The Employment Equity Act is the principal legislation for protecting and promoting constitutional values in the workplace.<sup>50</sup> It is designed to overcome the disadvantages that have been endured by historically marginalized groups such as people with disabilities. The EEA seeks to promote the constitutional right to equality, eliminate unfair discrimination in employment, and ensure the implementation of employment equity to redress the effects of discrimination and to achieve a diverse work force broadly representative of people of South Africa.<sup>51</sup>

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<sup>49</sup> Standing G 'Restructuring the Labour Market: The South African Challenge: An ILO Country Review' 1996 ILO.pg 464.

<sup>50</sup> Ngwena. C 'Equality and Disability in the Workplace: A South African Approach' (A seminar presentation in the school of law, University of Leeds, England, 29<sup>th</sup> November 2004. Available <http://www.leeds.ac.uk/disability-studies/archiveuk/ngwena/Leeds%20staff%20seminar%20Revisions.pdf> accessed on 6<sup>th</sup> March 2006

<sup>51</sup>Ngwena (n 50) at 17.

South Africa has ratified convention 111<sup>52</sup> which is concerned with discrimination in respect of employment and occupation. It is a model of early human rights instruments in that it seeks to ensure equality of opportunity and treatment in respect of employment and occupation. South Africa ratified this Convention on the 5 March 1997, which requires member states to declare and pursue a national policy designed to promote methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination therein.

In terms of the Employment Equity Act<sup>53</sup>, employment equity is concerned with two aspects of employment law, namely the prohibition of unfair discrimination in the workplace and the duty of designated employers to implement affirmative action programmes. The Act requires all employers to take steps to promote equal opportunity in the workplace and to prohibit unfair discrimination in all employment policies and practices.<sup>54</sup>

The categories of people identified were Black people and Women.<sup>55</sup> The designated groups under the Act are people with disabilities who are employees entitled to a range of affirmative action measures, including reasonable accommodation. According to the Act, reasonable accommodation means any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or to participate or advance in employment.<sup>56</sup> Designated employers are under an obligation to take positive steps in this regard.<sup>57</sup>

Hence, the purpose of the Act is to achieve equality through affirmative action. The unstated assumption in the application of affirmative action is the intention to remove obstacles to entry into or advancement in employment without fundamentally changing

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<sup>52</sup> Convention no. 111, of 1958 Concerning Discrimination in respect of Employment and Occupation

<sup>53</sup> Act 55 of 1998.

<sup>54</sup> Pretorius (n 47) at 7-18

<sup>55</sup> Section 1 of the EEA.

<sup>56</sup> Section 1 of the EEA.

<sup>57</sup> Section 1 of the EEA.

the nature of work and how it is to be performed.<sup>58</sup> Affirmative action does not usually concern itself with providing support to a person with disability so that the person can in the first place enter the job market. While affirmative action may work well with women and black people, external barriers in the employee-employer relationship create disadvantages that make it difficult for disabled persons to establish their employability.<sup>59</sup>

### **2.2.3. The limitations of affirmative action with regard to people with disabilities**

The application of affirmative action is intended to remove obstacles into employment without fundamentally changing the nature of work. Affirmative action does not concern itself with providing support to a person with disability so that that person can get placement in the job market. Many people with disabilities have no qualification that can be accommodated by making reasonable accommodation. Although reasonable accommodation is a crucial component in affirmative action, it does not address the impediments faced by people with disabilities. People with disabilities will require more than affirmative action and reasonable accommodation if substantive equality is to be achieved.<sup>60</sup>

### **2.2.4. The duty to accommodate people with disabilities in South Africa**

Reasonable accommodation is a primarily non-discrimination principle and an adjunct to the achievement of substantive equality.<sup>61</sup> In the South African context the duty of reasonable accommodation must be an enforceable duty rather than a mere privilege at the mercy of the employer. Thus the formulation of a question whether the employer has provided reasonable accommodation should be seen as an integral part of determining whether the employer has explored less discriminatory options prior to the discriminatory conduct in question.<sup>62</sup>

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<sup>58</sup> Ngwenya C 'Equality for people with disabilities: the limits of the employment equity Act of 1998' (2004) 29 (2) *Journal of juridical science* at 187 -193.

<sup>59</sup> Supra.

<sup>60</sup> Supra.

<sup>61</sup> Pretorius Supra (n 47) at 7-4

<sup>62</sup> Pretorius (n 47) at 7-35

The EEA intersects with reasonable accommodation only in respects of affirmative action duties. The EEA explicitly refers to reasonable accommodation only in respect of affirmative action. Section 15 of the Act requires a designated employer to implement affirmative action measures to ensure that suitably qualified people from designated groups have equal employment opportunities and are equally represented in all occupational categories and levels in the workplace of a designated employer.<sup>63</sup>

The reasonable accommodation principle is aimed at promoting a model of equality that recognizes diversity, disadvantage and the legitimacy of compensatory and distributive justice. Under the Constitution, the duty to make reasonable accommodation is linked to the principle of proportionality. It should be regarded as an implied duty in a statute such as the EEA which is required to give practical expression to the achievement of equality under the constitution in the context of workplace.

Prior to the new constitutional dispensation, the South African legal system intersected with disability mainly in relation to compensation for disabilities arising from the workplace as well as in social security provisions.<sup>64</sup>

The Compensation for Occupational Injuries and Diseases Act<sup>65</sup> governs compensation for disability arising from a disease or injury got in the scope and course of employment. The Social Assistance Act<sup>66</sup> determines eligibility for a disability grant for persons who suffer from a physical and mental disability for a period of 6 months or more which renders them unable to sufficiently provide for their own maintenance. Other than linking ability with functional incapacity these statutes are a limited utility when it comes to determination of disability for the purposes of reasonable accommodation.

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<sup>63</sup> Ngwena (n 58) at 187-193.

<sup>64</sup> White Paper on Integrated National Disability Strategy 1997

<sup>65</sup> Act no 130 of 1993.

<sup>66</sup> Act 59 of 1992.

### 2.2.5. The Code of Good Practice on Employment of People with Disabilities

The aim of the Code<sup>67</sup> of Good Practice on key aspects of disability in the workplace is to guide employers and employees on key aspects of promoting equal opportunities and fair treatment for people with disabilities as required by the Act. The Code is intended to help employers and employees understand their rights and obligations promote certainty and reduce disputes to ensure that people with disabilities can enjoy and exercise their rights at work.<sup>68</sup>

The Code is important because it eliminates unfair discrimination as well as achieving substantive equality in the workplace. It is for this reason that the code should extend to people with disabilities as a designated group entitled to additional equal opportunities measures including affirmative action measures.<sup>69</sup>

The Code acknowledges that people with disabilities tend to remain at the lower end of the job market and earn lower than an average remuneration.<sup>70</sup> The Code acknowledges that the lack of necessary skills and qualification is another barrier. People with disabilities have relatively less education and are likely to leave school with fewer qualifications.<sup>71</sup>

The code defines disabled people who satisfy all the criteria in the definition of the Employment Equity Act. The Act defines people with disabilities as people who have long-term or recurring physical or mental impairment which substantially limit their prospects of entry into employment. The code supports a liberal or progressive approach to disability on the person in relation to the working environment and not the diagnosis of impairment.<sup>72</sup>

The Code looks at disability in a social context. It is the interaction between impairment and workplace that holds the key to understanding the barriers hinder people with

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<sup>67</sup>Ngwena & Pretorius 'Code of good practice on the employment of people with disabilities: an appraisal' (2003) 24 *Industrial Law Journal* 1816 at 1829-1831.

<sup>68</sup> Supra.

<sup>69</sup> Section 1 of the EEA.

<sup>70</sup> Department of Labour Code of Good Practice: Key Aspects on the Employment of People with Disabilities (2003) Gazette 22209 19 August 2002.

<sup>71</sup> Neufeldt & Mathieson (n 14) cited in (n 67) 1817

<sup>72</sup> Ngwena & Pretorius supra (n 67) at 1819-1820.

disabilities. The Code provides guidelines not only desirable but necessary given the novelty of disability jurisprudence in South Africa and the general brevity of the Code.

#### **2.2.6. The Promotion of Equality and Prevention of Unfair Discrimination Act**

The Promotion of Equality and Prevention of Unfair Discrimination Act<sup>73</sup> does assist people with disabilities to assert their rights. The Act will apply to the extent that the EEA does not apply. Thus persons who fall outside of the definition of disability in section 1 may find relief in terms of Section 9 of the PEPUDA.

Section 9 provides examples of unfair discrimination. The section recognizes that the failure of the employer to reasonably accommodate a disabled person would constitute unfair discrimination. PEPUDA imposes a duty on the state to take special measures to promote the rights of persons with disabilities. The legislature prevents unfair discrimination by providing for procedures and substantive requirements for the determination of unfair discrimination.

The most important aspect of PEPUDA is the fact that it will apply to institutions and organs providing all kinds and forms of social security. The schedule of the Act contains a list of the so called unfair practices in certain sectors which reveal the objectives of the Act.

PEPUDA is quite explicit about the substantive nature of equality under the Constitution. It explicitly integrates reasonable accommodation in its formulation of the different forms that discrimination might assume in practice. PEPUDA makes it abundantly clear that reasonable accommodation is a general non-discrimination duty that applies to all prohibited grounds and not merely race, gender and disability.

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<sup>73</sup> Act 4 of 2000.

### 2.2.7. The Labour Relations Act

In terms of the section 187 (1) of the Labour Relations Act<sup>74</sup>, a dismissal is automatically unfair if the dismissal is based directly or indirectly on any arbitrary ground including disability. Such dismissal will be fair only if the employer can show that the person (due to the injury or disease) cannot perform the essential functions of the job.<sup>75</sup>

Reyneke discusses that the LRA states certain circumstances that constitute valid reasons for dismissal, inter alia, incapacity due to ill-health or disability. Guidelines for the dismissal of people on the grounds of incapacity due to ill-health and injury and the dismissal of people in cases of injury or ill-health are laid down in the code of Good practice: Dismissal.

Schedule 8, item 10 of the Code of Good practice: Dismissal gives some guidelines to ensure procedural fairness. It stipulates that when an employee becomes disabled, the employer must determine the nature of the disability.

The Code prescribes very specific guidelines that should be followed to dismiss an individual when he or she has an injury or ill-health has occurred.

In the case of temporary inability, other alternatives short of dismissal should be considered.<sup>76</sup> The employer should look for possible alternative employment to accommodate the person to enable him to perform the job.

The most important feature of the LRA as far as disabled persons are concerned is the fact that the rights of disabled people, in the workplace are explicitly mentioned and protected under the Act.<sup>77</sup> The LRA has also established a model combining the CCMA, the use of private procedures and the labour court. Its main attempt is to resolve disputes by conciliation to reduce the incidence of industrial action and litigation. This makes the enforcement of rights more accessible and less expensive for disabled employees.<sup>78</sup>

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<sup>74</sup> Act 66 of 1995.

<sup>75</sup> Section 187 (2) (a).

<sup>76</sup> Schedule 8: Item 10 (1).

<sup>77</sup> Section 187 (1) (f).

<sup>78</sup> Reyneke & Oosthuizen 'Are the rights of the disabled a reality in South Africa' (Part 2) 2004 29 (1) *Journal of Juridical Science* at 88-115.

Thus, the extreme levels of inequality and on- going discrimination experienced by disabled people in the workplace suggest that the provisions in the LRA are not sufficient to remove the discriminatory practices , nor to support the creation of equal employment opportunities for people with disabilities.<sup>79</sup> Therefore, it is necessary to enact legislation expressly designed to remove barriers which lead to discrimination against disabled people at the workplace. Such legislation is a necessary mechanism to ensure that people with disabilities enjoy equal opportunities in the workplace.

### **2.2.8. The Social Assistance Act**

The Act<sup>80</sup> provides for the payment of social grants to people who are unable to care for themselves without such assistance. Social grants are payable to persons older than 18 years who suffer from a physical or mental disability for a period longer than 6 months which disability renders that person unable to provide sufficiently for his or her own maintenance.<sup>81</sup> The Act is administered by the Department of Social Development's social assistance programme and it provides the legislative framework for awarding disability grants, dependency grants, and grants-in-aid. The care dependency grant is for disabled children, and the grant-in-aid is for disabled adults who might or might not be receiving a disability grant. In addition, the Department of Social Development gives a grant for social relief distress.<sup>82</sup>

The requirements for a social grant in South Africa are: that one has to be a South African citizen resident in South Africa, and one must prove one's inability to provide oneself. A person must also show that the degree of disability makes it impossible for him or her to earn a living. These requirements limit the access of many people with disabilities to social assistance.

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<sup>79</sup> White Paper on Integrated National Disability Strategy 1997

<sup>80</sup> Act 59 of 1992.

<sup>81</sup> Section 1 of the Social Assistance Act.

<sup>82</sup> Dube A.k. *'Role and effectiveness of Disability Legislation in South Africa'* Samaita Consultancy Programme Design March 2005 Edited by Eleanor Stanley. Available at [www.disabilitykar.net/docs/legislation\\_SA](http://www.disabilitykar.net/docs/legislation_SA) doc accessed on 2<sup>nd</sup> march 2006



It is estimated that the number of disabled persons qualifying for assistance is greater than those actually receiving grants. These shortcomings are attributed to the fact that the assessment of disability in the past often depended on a single doctor's opinion, who may have been informed of the patient's capacity to work and his or her specific disability.

Many people with disabilities do not have access to employment and the benefits associated therewith, many are dependent on government grants to survive. Due to the shortcomings many disabled persons are not awarded grants.<sup>83</sup> The Financial and Fiscal Commission estimated that only 56% of disabled people receive grants. While the budget brings good news to some disabled people, those who are still on the margins remain excluded from the basic services that government delivers. The challenge that remains is translating policy into tangible benefits for all disabled people.

#### **2.2.9. Skills Development Act**

The purpose of the Skills Development Act<sup>84</sup> is to develop the skills of the South African workforce, to increase the levels of investment in education and training, to improve the employment prospects of persons previously disadvantaged by unfair discrimination, and to redress those disadvantages through training and education, to encourage learning and training in the workplace, to assist job-seekers and retrenched employees to find work and to provide and regulate employment services.<sup>85</sup> The focus on skills development of people with disabilities should be the development of their specialized capabilities so that they are able to access income through formal sector jobs or community projects.

The Act offers a more effective departmental employment service which is capable of informing disabled people of various measures available. The Act also provides learnership courses and skills to meet the needs of community development as an industry. The learnership programmes are designed to help people with disabilities find work in the formal sector. The Act empowers disabled people to be self-sufficient and

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<sup>83</sup> Duke (n 82) at 32.

<sup>84</sup> Act 97 of 1998.

<sup>85</sup> Duke (n 82) at 24.

self-employed. Everyone including disabled people will have his or her skills recognized via the national qualifications framework and will be able to sell his or her skills and services in the same market place.<sup>86</sup>

The National Skills Development Strategy implementation report, equity targets underpin every objective of the National Skills Development Strategy (NSDS).<sup>87</sup> The NSDS state that the beneficiaries of the strategy should be 85% black, 54% female and 4 per cent of disabled people.<sup>88</sup> Equity is an essential principle for the transformation of economic relations, and education and training in particular. Addressing equity in skills development is critical to eliminating the skills constraint faced by the South African economy.

Some of the achievements of the skill development strategy is that the National Skills Fund (NSF) has taken steps to consolidate its bursary schemes. Bursaries for people with disabilities are being managed by the National Student Financial Aid Scheme (NSFAS) and the National Research Foundation (NRF).<sup>89</sup> The NSF also deals with social development initiatives that aims at funding training for the unemployed or the under employed people so that they are equipped with working skills to facilitate their entry into self-employment or the labour market.<sup>90</sup>

From 2002 to 2003, disability equity targets with regard to social development initiatives were met in 6 of the 10 provinces. Gauteng was divided into Gauteng South and Gauteng North) the highest attainment was Limpopo, followed by North West, Mpumalanga and the Northern Cape. The lowest attainment was Kwazulu/Natal. The overall average for the attainment of all provinces was 2.81 per cent.<sup>91</sup>

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<sup>86</sup>Duke (n-82) at 24.

<sup>87</sup> Commission of Social Security 2004.

<sup>88</sup> Supra.

<sup>89</sup> Commission of Social Security 2003.

<sup>90</sup> Supra.

<sup>91</sup> Supra.

In March 2005 the statistical data noted that the substantial growth in the number of black females and people with disabilities entering learnership programmes. Data indicates that the number of blacks grew from 6 per cent to 59 per cent in 2004, the number of females grew from 4 per cent in 2002 to 29 per cent in 2004, and the number of people with disabilities increased from 1 per cent in 2002 to 2 per cent in 2004.<sup>92</sup>

Although there are some achievements with regard to learnership programmes, the reality is that many disabled people might not qualify for these learnerships, hence the need for pre-learner ship programmes. The project is currently being developed and the plan will be presented to the ministry of labour directly.<sup>93</sup>

#### **2.2.10. The South African Schools Act 1996**

The Act provides for the inclusion of learners with special educational needs. Public schools are required to admit all learners without discrimination. In 1999, the Department of Education enacted the white paper on special education.<sup>94</sup>

The INDS defines inclusive education as the acknowledgement that all children and young people can learn, and that all children and youth need support. It further defines inclusive education as provision of enabling education structures, systems and learning methodologies to meet the needs of all learners. The White paper also acknowledges the differences in learners, whether due to age, gender, ethnicity, language, class, disability, HIV/AIDS or other infectious diseases. It also acknowledges that learning also takes place in homes and community, and within formal and informal settings and structures. The Paper emphasises on the change in attitudes, behaviour, teaching methods, curricula and environment to meet the needs of all learners and maximising the participation of all learners in the culture and curriculum of educational institutions, and uncovering and minimising barriers to learning.

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<sup>92</sup> Commission of Social Security 2003.

<sup>93</sup> Interview], Dr William Rowland, Chief Executive of Thabo Mbeki Development Trust for Disabled People (n 67) cited in (n 62) at 26

<sup>94</sup> Department of Education (1999).

However, there are challenges with regard to the implementation of the policies and the law. There is a lack of sufficient resources in the form of trained educators or teachers and children with disabilities are not fully integrated in public schools.<sup>95</sup>

A Community Agency for Social Enquiry (CASE) study found that low levels of education exacerbated unemployment among people with disabilities.<sup>96</sup> It further found that primary level education was accessible: 79% of the learners were attending mainstream primary Schools, 12% were attending special school, and 5% were not attending school at all. The fact that many disabled children attend mainstream primary schools does not mean that inclusive education training has been achieved.<sup>97</sup>

The high school level seems to be especially difficult. There are no provisions for disabled learners in high schools. This makes the lives of disabled learners very difficult and places a strain on teachers struggling to cope with a large class. There is need for a support system in high schools for disabled learners to engage in effective training. There is a high rate of non-attendance of school by children with communicative or learning disabilities. It is estimated that 66 to 71% of those children failing to attend could be as a result of lack of support of learners at the high school level.

Apart from the above mentioned Acts, there are specific legislations that exist to compensate people who are injured or disabled at work and motor accidents.

#### **2.2.11. The Compensation for Occupational Injuries and Diseases Act**

The Compensation for injuries and Diseases Act<sup>98</sup> replaces the Workerman's Compensation Act<sup>99</sup> and provides compensation for disablement caused by occupational injuries or diseases contracted by the employee in the course and scope of employment or death resulting from such injuries and diseases.<sup>100</sup> The Act prohibits delictual claims by

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<sup>95</sup> CASE 1999

<sup>96</sup> Supra

<sup>97</sup> Supra

<sup>98</sup> Act 130 of 1993

<sup>99</sup> Act 30 of 1941

<sup>100</sup> Reyneke&Oosthuizen (n 78) at 97

employees against their employers in respect of injuries sustained during the course and scope of employment. The contributions made by the employers are utilized by government to compensate victims of industrial accidents and diseases. In order to be eligible for compensation there must be a relationship between the employer and employee: an accident must occur causing an injury or death, and the accident must have arisen in the course and scope of employment.<sup>101</sup>

This Act can only be enforced if the employee notifies his employer verbally or in writing about the accident as soon as reasonably possible, and about his intention to claim compensation.<sup>102</sup> The employer must within seven days notify the Commissioner of the accident and clarify that the injury occurred in the course and scope of employment.

The claim for compensation must be lodged within 12 months of the date of the accident or the date of death.

There are challenges experienced by the current employment injury scheme, and improved services are necessary to ensure the effective application of the Act. Disabled persons are disadvantaged due to their low income and unemployable and are not well-positioned well to exert pressure on government to offer a better service. Benefits for the disabled due to work-related incidents are seldom sufficient and the Act does not compensate them for the loss of employment and poor future prospects.<sup>103</sup>

#### **2.2.12. The Road Accident fund Act**

It is stated by the White Paper on an Integrated National Disability Strategy that road accidents are the major cause of disability in South Africa. The major objective of the Fund<sup>104</sup> is the compensation for loss or damage, wrongfully caused by motor vehicles. The basis of claims for the injury or death of a person resulting from the unlawful and negligent driving of a motor vehicle is delict. The mechanism used by the third party compensation legislation is to ensure that the victim is protected from non-recovery of his

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<sup>101</sup> Reyneke&Oosthuizen (n 78) at 97

<sup>102</sup> Section 38 of Compensation for Occupational Injuries and Diseases Act

<sup>103</sup> Olivier &Others 1999 (n 154) cited (n 78) at 100

<sup>104</sup> Act 56 of 1996

damages due to the fact that the wrongdoer is unable to pay the victim's damages. As a result, the third party is compelled by law to institute his claim against the RAF, and not against the wrongdoer.<sup>105</sup>

The wrongdoer's common law delictual liability only occurs when the Act excludes or restricts the liability of the RAF.<sup>106</sup> If the wrong doer is not able to recover the damage the victim will suffer serious financial loss and may suffer possible disability.

The INDS found that complicated processing procedures often result in suffering or death of disabled applicants while waiting for the finalization of the claim.<sup>107</sup>

The Committee<sup>108</sup> has also found that some of the difficulties faced by the RAF is that the legislation is complex as a result the whole system becomes extremely legalistic. The other challenge is that delictual claims under the RAF require extensive investigation and can get costly.

In conclusion, it is evident that the Employment Equity Act, Social Assistance Act, and Skills Development Act have created a sense of awareness of the needs of disabled persons. However, with the exception of a few policies like the Social Assistance Act, the implementation of these policies has had a marginal impact on the lives of the disabled people in South Africa. The challenges faced are the lack of budgetary allocations, and the ignorance of civil servants charged with the responsibility of implementing these policies. Procedural bottlenecks have also been identified as the main cause of policy evaporation.<sup>109</sup>

People with disabilities still remain the most disadvantaged minority group. Unemployment is still less than 95%, because the education is compromised with the majority of children with disabilities lacking access to mainstream educational facilities.

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<sup>105</sup>Reyneke&Oosthuizen (n 78) at 100 - 102

<sup>106</sup> Section 17,18,19,21,25 of RAF

<sup>107</sup> chapter 3 of the RAF

<sup>108</sup> Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa March 2002

<sup>109</sup>Duke (n 82) at 40

As a result the vast majority of people with disabilities of employable age are still unskilled<sup>110</sup>

The employment opportunities still remain extremely limited, stereotyped and inaccessible. Unlawful dismissals and discrimination are common place. It is sad but true that disability remains unrepresented in employment equity forums and committees around corporate South Africa.<sup>111</sup>

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<sup>110</sup> Opperman J 'Disability: The Brussels Prouts of Labour legislation' Work shop 3, 'Brokering a fair deal' (2005) *18<sup>th</sup> Annual Labour Law Conference* Sandton Convention Centre. Available at [www.disabilitysolutions.co.za](http://www.disabilitysolutions.co.za)

<sup>111</sup> *supra*

### 3. INDIA

In India, it is estimated that in 1991 about 332 million of a population of 884 million existed below the official poverty line.<sup>112</sup> Clinical evidence suggests that between 3.7 and 6 per cent of the total population suffers from locomotor, visual, communication-related disability or from mental retardation. This is a larger proportion than that estimated as severely malnourished (2.7%).<sup>113</sup> At least 60 million people were likely to be disabled in 2001. Those people affected indirectly by disability amount to perhaps 4 to 5 times as many: 240 to 300 millions.

Six to 10 per cent of disabled people in India are in fact born with a disability. The children are especially vulnerable to disabilities resulting from malnutrition and communicable disease. The children are likely to die young as compared to developed countries. The other vulnerable groups are the women with disabilities, who are socially excluded and are in most cases hidden away and not allowed to marry.

India is one of the oldest civilizations in the world and it maintains a rich cultural heritage. India has achieved multifaceted socio-economic progress during the last 54 years since its independence, as it has become self-sufficient in agricultural production and is now the tenth industrialized country in the world.<sup>114</sup> A lot of work has been done for the a few disability people but when it comes to multiple disabled people the services are negligible.

It is estimated by the Community Based Rehabilitation projects that the number of persons with disability in India is over 90 million. There is a need for a concerted action, in both policy and practice to go beyond welfarism and ensure that these people can

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<sup>112</sup> (Ed) Harris et al 1992

<sup>113</sup> Subbarao, 1992, cited in Barbara harris-white 'staying poor chronic, poverty development policy.' Poverty and Disability with special reference to rural South Asia. Staying poor: Chronic poverty and Development Policy. International conference , IDPM, University of Manchester 7 to 9 April 2003

<sup>114</sup> Rungta S.K 'Training and Employment of people with Disabilities: India 2002' An Ability Asia country study , International Labour Office. Available at [www.ilo.org/abilityasia](http://www.ilo.org/abilityasia).



participate in and benefit from rural development programmes since the majority of people with disabilities in India live in the rural areas.<sup>115</sup>

India was one of the first countries in South Asia to become a signatory to the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Decade of Disabled Persons 1993 to 2002. An Act of Parliament the enabling implementation of this proclamation was passed.<sup>116</sup>

### 3.1. Definition of disability

Disability is a relative term because cultures define their norms of being differently. Disability may be identified by appearance ('ugliness', albinism, the absence of even a functionally unimportant digit while impairments recognized as disabling in western cultures (mild to moderate mental retardation, club foot) are often not treated as disabling.<sup>117</sup>

In South Asia, social deviancy is classified by many local people as a disability, as is an ascribed condition such as being outcast from the caste system. Some see economically oppressive, socially tyrannical and politically disenfranchising forms of work such as child labour and bonded labour as disabling. Yet others find (female) infertility or the delayed onset of menarche a serious impairment. Conditions such as asthma and TB, which are classified as 'sickness', are experienced as disabling in agrarian economies still based substantially on manual labour.<sup>118</sup>

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<sup>115</sup> Seely .J 'Recognising *Diversity: Disability and Rural livelihoods approaches in india*' Natural Resources Perspectives number 72, October 2001. Available at [www.odi.org.uk/nrp/72.pdf](http://www.odi.org.uk/nrp/72.pdf) accessed on the 2nd March 2006

<sup>116</sup> Runga (n 114) at 18

<sup>117</sup> Helander 1993, cited in (n 118) at 12.

<sup>118</sup> Barbara harris-white 'staying poor chronic, poverty development policy.' 'Poverty and Disability with special reference to rural South Asia'. *International conference , IDPM, University of Manchester 7 to 9 April 2003*. Available at <http://www.chronicpoverty.org/pdfs/conferencepapers/HarrissWhite.pdf> 9th march 2006

The most common definition and classification of disability in India is provided by the People with Disabilities (Equal Opportunities, Protection of Rights and Full Participation Act 1995.

There is no other definition of disability or classification of disability accepted for any purpose by the government for the entitlements of people with disabilities. The respective class of disability is entitled to the benefits, rights and entitlements granted by the respective enactment to that particular disability as a whole.

India defines disability based on a medical model. People with disabilities are defined as persons suffering from less than 40% of any ability as certified by a medical authority.<sup>119</sup> Disability has been classified into seven classes on the basis of a medical definition. These classes include people with; blindness, low vision, Leprosy, hearing impairment, loco motor disability, mental retardation and Mental illness

This definition is limited in the sense that it does not recognize the social, economic and political environment that disabled people live in. coupled with the above is the undue power and influence that has historically been given to medical professionals in deciding how the disabled persons should live.<sup>120</sup>

### **3.2. Legal protection for people with disabilities in India**

India is a signatory to the proclamation of the Asian and Pacific Decade of Disabled Persons 1993 to 2002. It has taken various steps towards fulfilling the targets of the proclamation. India has taken the initiative to integrate people with disabilities through vocational training and employment in all mainstream programmes in order to enlarge the coverage of the disabled population.<sup>121</sup>

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<sup>119</sup> The Persons with Disabilities ( Equal Opportunities, Protection of Rights and Full Participation Act 1995: Chapter 1,section 2(1) and Section 2 (T)

<sup>120</sup> Dr. Lang. R '*Understanding Disability from a South Indian Perspective*' School of Development Studies, University of East Anglia, Norwich NR47TJ, United Kingdom, June 2001. Available at [www.ee.umanitoba.ca/kinser/sds2001/proceed/pdocs/pdfs/22.pdf](http://www.ee.umanitoba.ca/kinser/sds2001/proceed/pdocs/pdfs/22.pdf)

<sup>121</sup> Runga (n 114) at 18

### 3.2.1. The Constitution of India

The Constitution in India<sup>122</sup> refers to disabled people in two places. Article 41 of the Constitution calls upon the government at all levels to make effective provisions for securing the right to work, education and to public assistance in cases of unemployment, old age, sickness and disablement. Article 16 (3) and (4) of the Constitution encourages the state to frame any law, make provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the state, have not been represented.<sup>123</sup>

Other relevant articles in the Indian Constitution providing constitutional guarantees for disabled persons are:<sup>124</sup>

Article 15(1) it enjoins on the Government not to discriminate against any citizen of India (including disabled) on the ground of religion, race, caste, sex or place of birth.

Article 15(2): It states that no citizen (including the disabled) shall be subjected to any disability, liability, restriction or condition on any of the above grounds in the matter of their access to shops, public restaurants, hotels and places of public entertainment or in the use of wells, tanks, bathing places (ghats), roads and places of public resort maintained wholly or partly out of government funds or dedicated to the use of the general public.

Article 17: No person including the disabled irrespective of his belonging can be treated as an untouchable. It would be an offence punishable in accordance with law.

Article 21: Every person including the disabled has his life and liberty guaranteed.

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<sup>122</sup> Constitution of India of 1996

<sup>123</sup> Anuradha et al 'Legal protection for persons with Disabilities in India.' 2004(14) *Interights Bulletin*.

<sup>124</sup> Zutshi B 'Disability Status in India' (2004) Case study of Dehli Metropolitan Region Development Jawaharal Nehru University, New Delhi, India . Available at [www.disabilityindia.org/statusbookframe.cfm](http://www.disabilityindia.org/statusbookframe.cfm) accessed on 2nd March 2006

Article 23: There can be no traffic in human beings (including the disabled), and beggar and other forms of forced labour is prohibited and the same is made punishable in accordance with law.

Article 29 (2): The right to education is available to all citizens including the disabled. No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds.

Article 32: Every disabled person can move the Supreme Court of India to enforce his fundamental rights and the rights to move the Supreme Court.

Despite, such a progressive constitution and judiciary, the approach to disability has been motivated by charity. The Indian society views disability as an individual issue and treats it within the means available to a family. Families in India rely on the services of charitable institutions. Similarly, the government of India is dependent on non-governmental organizations to secure basic rights like education, work, and shelter for people with disabilities.<sup>125</sup>

### **3.2.2. The Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act**

The above Act<sup>126</sup> came into force in 1996. It is a combination of service-oriented and rights-based legislation. The enactment of this Act marked an achievement for the Indian disability movement. The preamble of the Act aims to prohibit discrimination on the ground of disability in different spheres of life, provide positive discrimination in favour of people with disabilities, a grant relaxation in favour of respective disabilities, and the inclusion of people with disabilities.<sup>127</sup>

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<sup>125</sup> Anuradha et al (n 123) at 103

<sup>126</sup> The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act of 1995

<sup>127</sup> Runga (n 114) at 18

In the public sector, the government has to reserve 3 percent of posts in every establishment belonging to the state, central and local government for people with disabilities.<sup>128</sup> Thus, in order to implement this reservation the government has to identify posts in the establishment that are will be reserved for people with disabilities.<sup>129</sup>

Furthermore, no employee who acquires a disability in the course of his employment shall be removed from service, no promotion shall be denied to person on the ground of disability, and special employment exchanges will act as monitoring mechanisms for ensuring a 3 percent reservation.<sup>130</sup> Both the government and the public sector require every establishment to furnish prescribed information for people with disabilities. The government of India provides incentives to employers in both the private and public sector to ensure that five percent of their workforce is composed with people with disabilities.<sup>131</sup>

Runga contends that in India most people with disabilities live below the poverty line. The incidence of disabilities is very high in the rural and poor families of India. The Act mandates the government to include people with disabilities in all its mainstream poverty alleviation programmes. The government is to reserve no less than 3 percent in poverty alleviation programmes for the benefit of people with disabilities.<sup>132</sup> The Act also provides for the preferential allotment of land at preferential rates for setting up business and factories by entrepreneurs with disabilities.

The Act also provides for skills development, a barrier free environment and the availability of assistance devices, aids and appliances that promote both vocational training and employment for people with disabilities. Some of the provisions include the provision of free education for all children with disabilities under the age of 18 and the

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<sup>128</sup> The persons with Disabilities ( Equal Opportunities, Protection of Rights and Full participation) Act 1995 chapter VI section 33

<sup>129</sup> supra section 24

<sup>130</sup> supra chapter VI section 34

<sup>131</sup> The Persons with Disabilities ( Equal Opportunities, Protection of Rights and Full Participation ) chapter VI section 41

<sup>132</sup> chapter VI section 41

mandate of the government to establish special schools and vocational training facilities.<sup>133</sup>

The Act also provides for the removal of barriers in buildings to enhance the mobility of people with disabilities and for making roads, transportation and public facilities accessible.<sup>134</sup>

There is also Provision for training, welfare programmes, health and safety measures and the creation of a barrier-free environment in places where people with disabilities are employed.<sup>135</sup> The government is required to provide an insurance plan or any alternative programme for the benefit of people with disabilities.<sup>136</sup>

The Disabilities Act of 1995 has been the founding legislation to address the rights of people with disabilities in India. However, this Act is faced with some weaknesses such as the lack of political will, financial support and excessive bureaucracy. There is lack of awareness of the Act in government departments. There is no monitoring mechanism for the implementation of the Act. Lack of awareness among disabled people is high and finally there are no strong advocacy groups to influence decision and policy makers.<sup>137</sup>

### **3.2.3. Rehabilitation Council of India Act**

Another important law protecting people with disabilities in India is the Rehabilitation Council of India Act<sup>138</sup>. The Rehabilitation Council of India (RCI) was initially set up to regulate and standardize training policies for people with disabilities. In 1993, an Act of Parliament elevated the status of the council to a statutory body.<sup>139</sup>

The Act was later amended to the Rehabilitation Council Act of India (Amendment) Act<sup>140</sup>. It covers all the seven disabilities covered by the Persons with Disabilities Act of

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<sup>133</sup> chapter V, Section 26 (d)

<sup>134</sup> chapter VIII section 44,45 and 46

<sup>135</sup> Chapter VI section 38 (1) a and c

<sup>136</sup> Chapter VIII section 47

<sup>137</sup> Hernandez L W '*Moving Legislation into action: the example of India and South Africa*' [http://www.disabilityworld.org/01-02\\_01/gov/legislation.html](http://www.disabilityworld.org/01-02_01/gov/legislation.html) accessed 2006 /01/25

<sup>138</sup> Rehabilitation Council of India Act 1992

<sup>139</sup> Anuradha (n 123) at 104

<sup>140</sup> Act 38 of 2000

1995. The Amendment Act adopted the term rehabilitation given to it by section 2(w) of the Persons with Disabilities Act to mean a process aimed at enabling persons with disabilities to maintain their optimal physical or social functional levels as per Section 3(1) (iii) of the Rehabilitation Council of India Amendment Act 2000.<sup>141</sup>

The Act excludes any employee who does not possess criteria recognized by the Rehabilitation Council of India in areas of disability stipulated by the Act.<sup>142</sup> The Act also prescribes punishment of one year's imprisonment, or a fine of a thousand rupees for the breach of this provision.<sup>143</sup> The Act also provides the council with the mandate to provide quality education for the training of all rehabilitation professionals working in the field of disability covered by the Act. The council has also been given the mandate to carry out training programmes and research activities relating to the empowerment of rehabilitation professionals.<sup>144</sup>

Another important law that deals with the rehabilitation and empowerment of certain categories of disability is the National Trust for Welfare of Persons with Autism Cerebral Palsy, Mental Retardation and Multiple Disabilities Act 1999.

#### **3.2.4. National Trust for Welfare of Persons with Autism, Cerebral palsy, Mental Retardation and Multiple Disabilities Act 1999**

The aim of the Act is to fulfill a common demand of families that seek state assistance for severely disabled persons. The main objectives of the Act is to empower and enable disabled people to live independently and to draw them closer to their communities, to promote measures to protect people with disabilities in the event of death of a parent or relative, and to extend support to needs-based services during a period of crisis in the families of the disabled covered under the Trust Act.<sup>145</sup>

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<sup>141</sup>Runga (n 114) at 21

<sup>142</sup> Rehabilitation Council of India Act, 1992, (chapter 111 section 11)

<sup>143</sup> ibid chapter 111 section 13

<sup>144</sup> Rehabilitation Council of India (Amendment Act) 2000

<sup>145</sup> Runga (n 114) at 21

The Trust Act mandates the creation of local level committees (LLC) comprising magistrates together with one representative from a registered organization and one person with a disability. The LLC has the authority to decide on the issues of legal guardianship. The Trust Act also lays down the duties of the guardian.<sup>146</sup> The overall supervision of the Act is vested in the National Trust board appointed through a democratic process with a representative from a registered organization and others providing services for the disabled.

The Indian government is addressing the problems of people with disabilities by enacting legislation that will protect and empower them. There are no set laws that deal with discrimination against disabled persons in the area of employment. The recruitment rules contain medical standards which prohibit the employment of people with disabilities.<sup>147</sup> The Apprenticeship Act<sup>148</sup> prohibits people with disabilities from taking advantage of apprenticeship training programmes, because they are not regarded as competent as per the Indian Contract Act. Section 3 of the Apprenticeship Act stipulates that a person shall not be qualified to undergo apprenticeship training in any designated trade unless he over 14 years old and satisfies such standards of education and physical fitness as may be prescribed.

There are compensatory statutes that provide compensation and health care in the case of disablement and injury in the course and scope of employment. Section 3 of the Workmen's Compensation Act provides that if the employee is injured in the course of his employment the employer will be liable to pay compensation. The employer will not be so liable in respect of an injury that does not result in total or partial disablement of the workman, for a period not exceeding three days and in respect of any injury, not resulting in death or permanent total disablement, caused by an accident to which it is directly attributable to.<sup>149</sup>

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<sup>146</sup> Anuradha (n 123) at 104

<sup>147</sup> Runga (n 114) at 22

<sup>148</sup> Apprenticeship Act 1961

<sup>149</sup> Worker's Compensation Act, Labour law, Section 3



The other compensatory statute is the Employee's State Insurance Act, 1948 ( ECI) which provides that every insured employee will be entitled to receive disablement benefits at periodic intervals in the case of an employment injury suffered by him and resulting in his disability.<sup>150</sup>

The legislature in India aims to ensure equality for people with disabilities. These objectives have been achieved by granting them basic –socio-economic rights. The National Rights Commission of India also focuses on the human rights issues of people with disabilities, the removal of structural barriers by encouraging disability inclusive and laws, policies and programmes for people with disabilities. India is moving towards a legal framework that provides adequate safeguards both procedural and substantive for the protection of human rights.<sup>151</sup>

### **3.2.5. Disability policies and regulations in India**

There are also other organizations that implement policies for people with disabilities. The non-governmental organizations provide rehabilitation services and empowerment programmes. The Ministry of Social Welfare provides funds to the (non-governmental organizations) NGOs to run rehabilitation services and empowerment programmes in India. The NGOs in turn create specialized services for people with disabilities.

The government of India provides educational opportunities for people with disabilities. The Ministry of Social Justice and Empowerment has created special schools to cater for the educational needs of children with disabilities

The 86<sup>th</sup> Amendment of the Constitution of India Article 1 states that every child has a right to education. The education for children with disabilities in India has seen a shift from segregated education to inclusive education. Inclusive education is based on the principle that a school should accommodate children regardless of their intellectual and

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<sup>150</sup> Employees State Insurance Act, 1948, section 46

<sup>151</sup> Anuradha et al (n 123) at 104

physical conditions.<sup>152</sup> It is the responsibility of the Indian educational system to be able to include children with special needs within the educational system. Yet there is a need to empower special educational professionals, parents with children with special needs for inclusive education to be successful.<sup>153</sup>

However, in the rural areas of India there is lack of access to the relevant existing facilities and aids to people with disabilities as compared to the urban areas. While the schools and centers for people with disabilities do exist, the ratios of teacher to student as well as the teachers' qualifications do not serve the purpose for which the schools were established. The inadequate funds, poor wages, and the inadequate infrastructure have indeed confined the task of rehabilitation to diagnostic centers, special schools and vocational centers.<sup>154</sup>

The national government (Ministry of Health and Family Welfare) conducts and Coordinates programs for the prevention of disabilities throughout the country. These Programs include tetanus immunization for expectant mothers, Diphtheria Toxoid Immunizations for children, prophylaxis against nutritional anemia, provision of Vitamin A to prevent blindness, and health education for nutrition.<sup>155</sup> General health services are covered by district hospitals and primary health centers managed by private institutions and government administrations. But facilities for medical rehabilitation are inadequate in coverage because they are restricted to urban areas.<sup>156</sup>

### **3.2.6. Community Based Rehabilitation programmes in India**

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<sup>152</sup> Narayan et al 'Utilizing Existing Resources for Inclusive Education of children with Disabilities in India' 2006 (17) no.1 *Asian Pacific Disability Rehabilitation Journal* available at <http://www.aifo.it/english/resources/online/apdrj/apdrj202/contents.htm>

<sup>153</sup> *supra*

<sup>154</sup> Country Profile India 2002

<sup>155</sup> *supra*

<sup>156</sup> Thomas M J 'An Overview on Disability Issues In South Asia' 2002 (13) no.1 *Asia Pacific Disability Rehabilitation Journal* Available at <http://www.aifo.it/english/resources/online/apdrj/apdrj202/contents.htm> accessed on the 9th march 2006

In India the disability related policies are moving from a medical rehabilitation towards a Community-Based Rehabilitation for the self-sufficiency and improvement of people with disabilities through vocational training and education. The government launched District Rehabilitation Center schemes to provide rehabilitation services for people with disabilities living in the rural areas.<sup>157</sup> The DRC provide services such as prevention and early detection of disabilities, therapeutic services, educational services, training, provision of self employment opportunities and bank loans.<sup>158</sup>

It is estimated that 70% of disabled people need the intervention of the CBR while the remaining 30% with severe or multiple disabilities would require specialist help and not CBR. When it comes to people with severe disabilities, the CBR programmes face difficulties, because many of the programmes are initiated by external agents who may not follow up the progress of the disabled person.<sup>159</sup>

Women with disabilities face a lot of discrimination. They face difficulties in their gender or cultural roles, participation in the community life and accessing rehabilitation services dominated by men. The concern for women with disabilities is neglected in organizations because they are dominated by disabled men.<sup>160</sup>

The difficulties arising from implementing the CBR systems in India and elsewhere are,<sup>161</sup> the tendency to work in ignorance, because CBR leaves little time for reading and seeking information, the different cultural concepts with regard to the meaning of disability, health, community and patterns of interventions, little or no incentive for investment, no infrastructure and information because CBR programmes are non-commercial, language barriers and a lack of access that prevent communities from

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<sup>157</sup> [www.apcdproject.org/countryprofile/india\\_current.html](http://www.apcdproject.org/countryprofile/india_current.html) accessed on the 23<sup>rd</sup> Feb 2006

<sup>158</sup> *supra*

<sup>159</sup> Thomas M.J et al 'A Discussion on Some Controversies in Community-Based Rehabilitation' *Asia Pacific Disability Rehabilitation Journal* 2002.(13) No.1 Available at <http://www.aifo.it/english/resources/online/apdrj/apdrj102/contents.htm> accessed on 9<sup>th</sup> March 2006

<sup>160</sup> *Supra*

<sup>161</sup> Miles M 'CBR Works Best the way local people see it and build it' 2003 (14) No.1 *Asia Pacific Disability Rehabilitation Journal* Available at <http://www.aifo.it/english/resources/online/apdrj/apdrj103/contents.htm> accessed on the 9<sup>th</sup> march 2006

exchanging their experiences and progress, and a gap between services for disabled children and adults. This contributes to the fragmentation of knowledge.<sup>162</sup>

It has also been admitted that many CBR projects have in fact been managed and directed with few real inputs from the community and disabled people. Instead pre-existing medical approach has been adapted and applied with community settings. This of course has completely excluded the social and political dimensions of disability.<sup>163</sup>

In conclusion, the government of India through the enactment of legislation and policies has helped to shift public attention from providing charity to disabled people to protecting their rights. However, there is little that has been done to promote awareness of the legislation, and the government relies on NGOs to provide vocational training, education and other services. The NGOs have translated some laws into local languages to make it easier for people with disabilities to understand.<sup>164</sup>

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<sup>162</sup>Supra

<sup>163</sup> Stone E. *'Disability and Development: Learning from action and research on disability in the majority world'* 1999 Leeds, Disability Press

<sup>164</sup> Hernandez (n 136) at 1

#### 4. UNITED STATES OF AMERICA

The United States was one of the first countries to adopt disability anti-discrimination legislation. After the adoption of the Civil Rights Act of 1964<sup>165</sup> which proscribes discrimination on the grounds of race, colour, religion, sex and national origin, many people, including disabled people and legislators began to see disability in a similar light.

Disability law underwent profound transformation during the 20<sup>th</sup> Century. At the beginning of the century disability law was essentially a scheme of social welfare that sought to provide for injured veterans of the Civil War and World War 1.<sup>166</sup> The law began to incorporate the idea of rehabilitation and the return to productive activity for people with disabilities, starting with the injured and then extending to people with disabilities more generally.<sup>167</sup>

In the 1950s the creation of the Social Security Disability Insurance and the Federal Aid to the permanently and totally disabled program cemented the social welfare orientation of disability law. Under these programmes, the law made disability a way out of the work force, an exemption from the ordinary societal obligation to work for a living.<sup>168</sup>

The enactment of the Rehabilitation Act of 1973 marked the start of the significant shift in disability law from welfare to a civil rights orientation. People with disabilities who had been treated as members entitled to charity and exempted from the obligation of work were now treated as full citizens entitled to participate equally in all community activities.<sup>169</sup>

Through grassroots protests, litigation and insider lobbying disability activists fought to ensure that the new civil rights provisions would be implemented. They lobbied further

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<sup>165</sup> Title VII of the Civil Rights Act of 1964.

<sup>166</sup> Skocopol (n 1) cited in (n 21) 649.

<sup>167</sup> Berkowitz (n 3) cited in (n 21) 649

<sup>168</sup> Bagenstos (n 21) at 649

<sup>169</sup> Supra

for the enactment of a comprehensive Disability Anti-Discrimination Law. The Congress later enacted the Americans with Disabilities Act of 1990.<sup>170</sup>

#### 4.1. Definition of Disability

The United States lacks a uniform definition of or criteria on disability. The agencies that are charged with collecting disability-related data have their own definitions. The United States Social Security Administration (SSA) 2003 defines disability as the inability to engage in a substantial gainful activity (SGA) because of a medically determinable physical or mental impairment that can be expected to result in death, or that is expected to last for a continuous period of at least 12 months.<sup>171</sup>

There are three major sources of comprehensive government-complied disability statistics in the United States of America. The Centre of Disease National Health Interview Survey (NHIS), the Census Bureau and Bureau of Labor Statistics Joint Current Population Survey (CPS), and the Census Bureau and Bureau of Labor Statistics Joint Survey on Income and program participation (SIPP). All the above sources do not measure disability according to the ADA definition instead they use a number of definitions none of which capture everyone who is covered by the ADA definition.<sup>172</sup>

The NHIS uses at least two measures to define disability, the impairment measure asks whether the subject has a diagnosed impairment but does not ask whether that impairment causes functional or work-related limitations. The work limitation on the other hand asks whether the subject has impairment or health problem that keeps the subject from working or limits the kind of work the subject can do.<sup>173</sup>

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<sup>170</sup> Bagenstos (n 21) at 650.

<sup>171</sup> Albritton FR 'A Comparative Analysis of Business Major's Attitudes towards Disability, Job Applicant Disability Status, and the Placeability of persons with disabilities.' Available at <http://etd.lib.fsu.edu/theses/available/etd-07112-accessed on 31-01-06>.

<sup>172</sup> Stapleton et al 'Has the Americans with Disabilities Act reduced Employment for people with disabilities? The decline in employment of people with disabilities.' 2004 (25) *Berkely Journal of Employment and Labor Law*. Available at <http://web.lexis-nexis.com/professional/> accessed on 8<sup>th</sup> march 2006

<sup>173</sup> Supra

The CPS also uses two definitions that focus on the ability to work, and 'the work limitation' that is used by the (NHIS).

The SIPP uses at least three disability definitions, the 'work limitation' measure like other surveys, the 'house limitation' which asks whether the subject has a health condition that limits the kind or amount of work the subject can do around the house and finally the 'other limitation' which asks whether the subject has a health condition that causes difficulty in any variety of activities of daily life.<sup>174</sup>

The Social Security Disability Insurance (SSDI) and the Supplemental Security Income (SSI) define disability entirely in medical terms. The ADA on the other hand defines disability as a physical or mental impairment that substantially limits one or more of the major activities of the individual. There must be a record of such impairment and of the individual having such impairment.

## **4.2. Legal frameworks for the Disabled in the United States.**

### **4.2.1. Rehabilitation Act**

The Rehabilitation Act<sup>175</sup> moved away from a wholly medical or pathological approach to disability policy, and moved toward a functional approach, which sought to integrate persons with disabilities into mainstream American life. The Rehabilitation Act also embodied the notion that integration was a civil right to which persons with disabilities were entitled.<sup>176</sup>

The Rehabilitation Act required "recipients of federal funds to make their programs and services accessible" to the handicapped "by eliminating physical barriers and providing adaptive equipment and aides." Educational institutions, for example, had to provide

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<sup>174</sup> Stapleton (n 172) at 532

<sup>175</sup> Rehabilitation Act of 1973

<sup>176</sup> Miranda O.M. 'Reconsidering the Americans with Disabilities Act' 2000 (35)*Georgia Law Review Association* at.27 Available at <http://web.lexis-nexis.com/professional> accessed on the 15th march 2006

sign-language interpreters for deaf persons and books on tape or in Braille for blind persons.<sup>177</sup>

Miranda contends that S 501 of the Rehabilitation Act creates a governmental obligation for private employers, whereby each Department or Agency could submit to the Equal Employment Opportunity Commission (EEOC) an affirmative action plan for hiring, placement and advancement of individuals with handicaps in such Department or Agency. Section 503 of the Rehabilitation Act mandates all holders of federal contracts in excess of \$10,000 to take affirmative action to employ and advance employment for individuals who qualify with a disability.

Section 504 of the Rehabilitation Act provides for non-discrimination under federal grants and programmes generally. The expanse of the s 504 had extensive and direct ramifications and therefore marked a huge triumph for disabled Americans.

Although, the provisions of the Rehabilitation Act were ground breaking, many proponents recognized its limitations for example, the civil rights law provided unmitigated protection to women and minorities, where as 504 prohibits discrimination solely on by reason of disability. The Act did not also cover private employers other than private contractors regardless of the discriminatory nature of their actions. Since the Act only catered for federal employees, a series of court cases reduced the scope of the Act to the point of inefficacy.<sup>178</sup>

One of the cases sought to extend the coverage of the Rehabilitation Act was *Alexander vs Choate*<sup>179</sup> but was a great disappointment to people with disabilities. The medic aid recipients brought class action for a declaratory and injunctive relief against that state's reduction from 20 to 14 of the number of inpatient hospital days that the state medic aid would pay hospitals on behalf of a Medicaid recipient in each year. The court held that for purposes of the Rehabilitation Act the medic aid was a particular package of health

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<sup>177</sup> Supra at 60

<sup>178</sup> Besner E A 'Employment Legislation for Disabled Individuals: What France can learn from the Americans with Disabilities Act' 1994 to 1995 (16) *Comparative Labor law Journal* at 399. Available at [www.Heinonline.org](http://www.Heinonline.org) accessed on 3<sup>rd</sup> march 2006

<sup>179</sup> 469 US 287 1985



care services and that the reduction of inpatient coverage did not violate the Rehabilitation Act.

In 1987, the Supreme Court offered hope for disabled people in the United States. In *School Board of Nassau County vs. Arline*<sup>180</sup> the court ruled that a discharged school teacher with tuberculosis was handicapped within the meaning of the Rehabilitation Act. It further stated that the district school was federally funded and could not discriminate against her solely because of her handicap. The decision encouraged people with disabilities by averring that they could not be overlooked.

In response to the shortcomings, agencies like National Council on the Handicapped, the Leadership Conference on Civil Rights and the American Civil Liberties Union helped to secure support for the protection of the disabled and ultimately contributed to the introduction of many proposed revised and amended version of the Americans with Disabilities Act. President George H.W Bush signed the Bill July 26 1990, marking an end to pervasive discrimination against people with disabilities.<sup>181</sup>

#### **4.2.2. The Americans with Disabilities Act**

The Americans with Disabilities Act<sup>182</sup> was a historic achievement. It presented the American society with the first comprehensive acknowledgment that people with disabilities are truly equal citizens, fully entitled to participate in all areas of political, economic, and civic life. In large and small ways the statute has improved the lives of countless individuals who have disabilities. The ADA has made buildings more accessible and people with disabilities more visible in the community, and it has accelerated the process of removing the stigma from disability.<sup>183</sup>

The Employment provision of the ADA Title I states that:

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<sup>180</sup> 480 US 273 1987

<sup>181</sup> Sciallo L A 'The ADA through the looking glass' 2002 (68) *Brooklyn Law Review* at 589. Available at <http://web.lexis-nexis.com/professional> accessed on 4th march 2006

<sup>182</sup> Americans with Disabilities Act of 1995.

<sup>183</sup> Bagenstos ( n 21) at 3

“[No] covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment.”<sup>184</sup>

The three fundamental rules in this substantial title are: essential function of a job, reasonable accommodation and undue hardship.

In *Riley vs Weyerhaeuser*,<sup>185</sup> the court contended that the employers did not discriminate on the basis of disability because the company could not provide alternative employment for the employee who was unable to perform the essential function of the job.

Title II deals with public services and public transportation based on Section 504. Title II is enforced by the Justice Department which covers public services and by the Department of Transportation which monitors public transportation. No individual who has qualified with a disability will be excluded from participation in or benefit of services, programmes or activities of a public entity.<sup>186</sup> The title however, does not apply to employment. In *Zimmerman Vs Oregon Dept Justice*<sup>187</sup>, the employment of the employee was terminated. The employee alleged that he had been discriminated against and this was in violation of title II. The claim was dismissed by the United States District court and the court held that title II did not apply to employment

Fleisher contends that Title III deals with public accommodation, it prohibits discrimination based on disability in any public business or services operated by private entities. Places of public accommodation are shopping centers, restaurants, offices, banks theatres. This Title mandates for the removal of architectural and communications barriers. The factors to be considered include the nature and the cost of structural modifications, size, and financial resources. If the removal is not readily achievable then the ADA decrees that alternative methods be made available.

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<sup>184</sup> 42 U.S.C. 12112 (a) 1988 supp v 1994

<sup>185</sup> The US.Court of Appeals for the Fourth Circuit Affirmed the District Court's ruling in 77 F2D 470

<sup>186</sup> Fleischer D Z et al '*The Disability Rights Movement ( From charity to confrontation)*' 2001 Temple University press, Philadelphia

<sup>187</sup> 170 F.3d.1169 (9<sup>th</sup> Cir 1999)

Fleisher further discusses that Title IV of the ADA deals with nationwide, daily, twenty four-hour intra state and interstate relay services originated with the ADA. To ensure equal access to telephonic services, Title IV enables people with hearing and speech impairment who use teletypewriters to communicate with people who use voice phones. Title IV requires television stations to include close-captioning of public service announcements that are federally funded in whole or in part.

Fleisher discusses that Title V consists of key classifications and exclusions. The Title clearly states that the ADA cannot be employed as a means of decreasing standards established by Title V of the Rehabilitation Act of 1973. The states are subject to the ADA, but the ADA does not nullify state or local laws that provide protections equal to or greater than those of the ADA. Other significant provisions include the explanation of the definition of disability, and the protection of people who have filed claims, proceedings, and hearings under the ADA.

The enactment of the ADA lifted the morale of the disability activists because they finally received what they had fought for over the past seven decades. Rather than establishing a quota system which proved impossible to enforce by the overly taxed EEOC, the ADA coverage was wider and served to discourage the non-hiring of disabled workers while at the same time discouraging the discharge of the same.<sup>188</sup>

The ADA adopts a broad definition of disability. An individual is regarded as having a disability for the purposes of the legislation if he or she falls under one of the following three categories: the individual has to have a physical or mental impairment that substantially limits one or more of the major life activities of such individual, the individual must have a record of such impairment or is regarded as having such an impairment.<sup>189</sup>

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<sup>188</sup> Schiff & Miller (n-82) cited in (n 178) at 412

<sup>189</sup> Beaumont A E 'This Estoppel has got to stop: Judicial Estoppel and the Americans with Disabilities Act' 1996 (17) *New York University Law Review* at 1529. Available at <http://web.lexis-nexis.com/professional/accessed> 9th march 2006

Beaumont discusses that the first definition accounts for conditions that are traditionally thought of as disabilities, such as physical abnormalities and learning disabilities.

The second definition targets residual discrimination that might occur when a disability no longer exists for example when a cancer survivor is treated as if she has cancer.

The third definition covers those people who are treated as if they have a disability. This provision is aimed at stereotypes, biases and premature conclusions about the abilities of people with disabilities.

The innovations of the ADA are borrowed from the preceding legislation. The ADA uses the concept of a qualified individual with a disability taken from the Rehabilitation Act.

The ADA requires employers to take affirmative steps to hire otherwise qualified disabled workers by making reasonable accommodations for their disabilities. The ADA forbids employers from taking into account the cost of reasonable accommodations when making hiring decisions unless such accommodations would impose an "undue hardship" on the employer.<sup>190</sup>

Besner argues that while the Act requires the employer to provide affirmative action, the ADA does not provide affirmative action through the quota system or any other regime. The Act sets up obstacles that would prohibit the hiring of a disabled person. The ADA and its predecessor, the Rehabilitation Act,<sup>191</sup> incorporate the idea that the ability of persons with disabilities to get jobs or access to training is limited by the prejudice of others rather than the direct effects of injuries or illnesses alone.<sup>192</sup>

While the ADA's achievements have been celebrated, it has contributed to the drop of disability employment in the United States of America. While the provision for

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<sup>190</sup> Besner (n 178) at 416

<sup>191</sup> Act of 1973

<sup>192</sup> Johnson W.G. 'The Americans with Disabilities Act: Social Contract or Special Privilege? The future of Disability Policy: Benefit payments or civil Rights'. (1997) 549 *Annals* 160 *The American Academy of Political and Social Science Journal*. Available in <http://web.lexis-nexis.com/professional> accessed on 28th march 2006

reasonable accommodation acts as an incentive to people with disabilities<sup>193</sup>, the employers on the other hand would use this as a loophole to avoid the employment of any disabled person in their workplace.

The March Current Population Survey for 1988 to 1997 showed a decline in the relative employment of disabled person's men and women aged 21 to 39. The deterioration began in 1993 for the men and 1992 for the women. Employment declined more in Medium Size firms possibly because small firms are exempted from the ADA. This suggests that the negative effects of the ADA may have been more to the accommodation rather the lawsuits that the employers would be faced with.<sup>194</sup>

#### **4.2.3. The Principle of Reasonable Accommodation**

In America, reasonable accommodation has its origin in the civil rights jurisprudence of the 1960s. Initially it was developed to accommodate religious diversity in the workplace by allowing workers who could not work normal work hours on an account of their religious beliefs.<sup>195</sup> The early jurisprudence concerning reasonable accommodation was limited to circumstances where the employer would not do more than he would in trying to accommodate the employee. Another limitation would be that reasonable accommodation was limited to accommodating religious beliefs only.<sup>196</sup>

The ADA requires employers to provide reasonable accommodation to help individuals with disabilities perform the essential functions of their jobs that their disability conditions make them unable to perform, unless the accommodation would impose undue hardship.

In *Gilbert vs Frank*<sup>197</sup> the plaintiff, as a reasonable accommodation, sought a waiver of the heavy lifting and handling requirements of the position with the U.S. Postal Service. Alternatively, he suggested that other employees could handle these tasks on his behalf.

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<sup>193</sup> Acamoglu et al 'Consequences of employment protection? The case of the Americans with Disabilities Act' 2001 (105) no.5 Journal of political Economy

<sup>194</sup> Supra (n 192) at 917

<sup>195</sup> Ngwena C 'Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human rights issue.' 2004 Journal for Juridical Science 29 (2) 167-197

<sup>196</sup> Supra

<sup>197</sup> 1991,Cas NY949 f2d 639

The court found, however, that these tasks constituted essential functions of the position and that an employer is not required to eliminate essential elements of a position as a reasonable accommodation.

If the individual is unable to perform the essential functions of the position, then the individual is not "otherwise qualified" and falls outside of the protection offered by, in this instance, the Rehabilitation Act.<sup>198</sup>

The ADA utilizes two principles to provide reasonable accommodation: the job-related rule and the access/content distinction.

#### **4.2.4. Job-related Rule**

Under this rule, Bagenstos contends that the employer might be required to provide a disabled individual with an accommodation that specifically assists the employee in performing the duties of a particular job as long as the accommodation is reasonable and can be provided without undue hardship. Thus, the employer will never be required to provide adjustments or modifications that would assist the employee throughout her daily job schedule.

Bagenstos argues that the job-related rule plainly rules out a number of accommodations that could have been provided at reasonable cost and without undue hardship and also provide off-job benefits.

The rule excuses the employers providing assistive technology that the disabled people would use in the workplace. This rule is more of a loophole for the employer to avoid accommodating the disabled persons. There is no need for the employers to provide medical insurance, rehabilitate the disabled persons, or provide training programs that would enable the disabled person to perform. In all the above-mentioned instances accommodation might enable an individual to work and it might be provided at a reasonable cost without undue hardship.

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<sup>198</sup> Kapusta T J 'When Does Job Restructuring Constitute Reasonable Accommodation Of Qualified Disabled Employee Or Applicant?' 142 *Americans Law Reports (ALR) 311 fED* Available at <http://international.westlaw.com> accessed on 9<sup>th</sup> march 2006

But an employer will never be required to provide aides who offer off- the- job help, no matter how inexpensive. Bagenstos argues that the job-related rule represents a significant limitation on the power of accommodation requirement to disestablish deep –rooted structural obstacles to employment for people with disabilities.

#### **4.2.5. Access/ Content distinction**

The ADA uses the above rule to adjudicate accommodation claims under the three substantive Titles of the ADA. Title I prohibits discrimination in private employment, Title II prohibits discrimination by state and local government and Title III prohibits discrimination in places of public accommodation.

Bagenstos argues that the Access/Content Distinction transforms the accommodation rule into a classic anti-discrimination requirement. People with disabilities are to be afforded the same benefits received by non-disabled individuals. This basically means that any accommodation that would alter the content of the benefit will not be required even if it is provided at reasonable costs and without undue hardship.

An illustration of this is *Alexander vs Choate*; where the plaintiff's, a class of Tennessee Medicaid recipients with disabilities, challenged that state's decision to cut back its annual medical coverage of in- patient hospitalization from twenty to fourteen days. The fourteen-day cap had a disproportionate impact on people with disabilities. The court ruled that the fourteen day limitation would not deny the respondents access to Tennessee Medicaid services or exclude them from those services. The court contended that the reduction in in-patient coverage would leave both the handicapped and non-handicapped Medicaid users with identical and effective hospital services fully available for use by both classes of users subject to the same durational limitation.<sup>199</sup>

Essentially, the job-related and the access/content distinction are the rules that the ADA is using to accommodate the disabled. There are limitations however. Bagenstos argues

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<sup>199</sup> Alexander case (n 179)

that the job-related rule rests on the ready notion of corrective justice. The employer will only be liable for the obstacles he creates that hinder the employment of disabled people. On the other hand, Bagenstos argues that the access/content distinction, rule fails the disabled person because, all it seeks to achieve identical benefits with the non-disabled.

#### **4.2.6 Disability Benefit programmes in the United States of America**

The two largest disability programmes in the United States of America are the Social Security Disability Insurance and the Supplemental Security Income. The SSDI is an insured programme while the SSI is a means tested programme that requires participants to fall below income and asset thresholds.<sup>200</sup>

#### **4.2.7 The Social Security Disability Insurance**

Since its enactment in 1956 SSDI programme has provided income protection that is not otherwise readily available to American Workers.<sup>201</sup> The SSDI is designed to provide for benefits to a person with a disability so severe that she is “unable to do [her] previous work” and “cannot engage in any other kind of substantial gainful work which exists in the national economy.”<sup>202</sup>

For a person to be eligible for the SSDI benefits, he must be disabled (unable to engage in any substantial gainful activity). The benefits are also available to individuals who have a medical condition that is expected to last one year or result in death. Thus, in order to claim disability claims through the SSDI, a number of steps have to follow:

Step 1. Are you presently working? This can be illustrated by *Kutch man vs. Cohen*.<sup>203</sup>

In this case the plaintiff was granted a disability benefit based upon the finding of partial paralysis. She later obtained a full-time job in the labour market. She earned \$140 per month at her place of employment where she worked without assistance.

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<sup>200</sup> Mitra S ‘Disability and Safety nets in Developing Countries’: (2005 ) no.0509 *Social Protection Discussion Paper* series. Available at social [protection@worldbank.org](mailto:protection@worldbank.org) accessed on the 3<sup>rd</sup> march 2006

<sup>201</sup> How SSA’s Disability Programs can be improved : Social Security Advisory Board August 1998 [www.ssab.gov/publications/disability/reports 6.pdf](http://www.ssab.gov/publications/disability/reports6.pdf) accessed 1<sup>st</sup> Feb 2006

<sup>202</sup> Section 223(a) of the Social Security Act as set forth in 42 U.S.C. § 423(d)(2)(A).

<sup>203</sup> See 20 C.F.R. § 404.1520(b) (1998).



Based on this information, the Secretary of Health and Education found that her disability had ceased following the completion of the trial work period. The Court of Appeal held that the plaintiff had demonstrated her ability to engage in substantial gainful activity even though there was no change in her physical condition from the time the disability grant had been granted.

Step 2: Does the worker have a severe impairment that limits his ability to do basic work? Under this test, a severe condition means that the worker's medical condition limits his ability to engage in basic work activities. In *Bowen vs. Yuckert*,<sup>204</sup> the issue before the court was whether the Secretary of Health and Human Resources could deny a claim for SSDI benefits based on the fact that the claimant did not suffer from a medically severe impairment that limited the claimant's ability to engage in basic work activities.

The claimant alleged that she was disabled by an inner ear dysfunction, headaches and dizzy spells. Yuckert had been employed as a travel agent and had worked intermittently as a real estate sales person. The agency concluded that the medically determinable impairment was not severe. The court upheld the decision but remanded the case to determine whether the decision was supported by medical evidence.

Step 3. Does the impairment meet or equal impairment on a specific Agency list?

The Agency has created a detailed list of impairments. This list helps the Agency in determining whether the individual is disabled under the Agency definition by looking at the condition of the worker and the Agency list of impairments.<sup>205</sup> Under the Agency regulations if the worker matches the list of impairments or a non-listed condition equal to the severity of a listed condition, there is a presumption of disability.

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<sup>204</sup> 482 U.S. 137 (1987)

<sup>205</sup> *Disability Evaluation Under Social Security*, SSA Publication No. 64-039 (2005)(also known as "Blue Book").

In *Cleveland vs policy Management*,<sup>206</sup> the government defended the Agency list on the basis of efficiency in the administration of a large benefit system. The list helps to eliminate considerations of many differences potentially relevant to an individual's ability to perform a particular job.

Step 4. If the impairment does not meet or equal a listed impairment, can the worker perform his past work?

Under this step the Agency determines if the worker's condition prevents the worker from performing past work. If the worker is not able to do any past work, he is deemed disabled. Otherwise the Agency will consider the last step of the process.

Step 5 If the impairment does not meet or equal a listed impairment and the worker cannot perform her past work, and then can the worker perform other jobs that exist? If the worker is not able to perform his past work, but is able to perform in an alternative job, would such a worker be eligible for benefits? The court decided in *Simonsen vs HHS*<sup>207</sup> that the Agency is not required to identify a particular job that the plaintiff could perform.

In the United States people with disabilities have to be assessed according to the steps discussed above for them to be eligible for SSDI benefits. Although these procedural steps help to provide SSDI benefits, at the same time they hinder many disabled persons from claiming what is rightfully theirs.

#### **4.2.8. Supplemental Security Income Program (SSI)**

The SSI was added to the list of programs administered by the Agency in the 1970 Amendment. The SSI is a federal income supplement funded by general tax revenue in the United States. Its main purpose is to provide help for the aged, blind and the disabled

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<sup>206</sup> 526 U.S. 795 (1999)

<sup>207</sup> USDC, S.D. CALIF., Civ. No. 79-927-T (1/14/81).

who have little or no source of income.<sup>208</sup> These people are provided with cash to meet their basic needs for food, shelter and clothing.

To be eligible for the SSI benefits the individual must, if aged 18 or older, meet the Social Security definition of disability, or, if under the age 18, must have an impairment that results in marked or severe functional limitations. A disabled individual must not have a monthly income in excess of the current Federal benefit rate (\$494 for individuals and \$741 for a couple), and cannot own real or personal property (including cash) in excess of a specified amount (\$2,000 for individuals and \$3,000 for couples). Finally, the disabled individual must meet certain other requirements relating to citizenship, residence, and living arrangements.<sup>209</sup>

The SSI benefits are based on financial need and are means- tested. One of the decisions addressing the application of the means test in the SSI programme is *Chalmers vs Shalala*.<sup>210</sup> In this case the claimant Chalmers had been receiving SSI benefits based on her disability (Schizophrenia). In 1980 she jointly inherited property with her siblings and subsequently formed a partnership with them to manage the property. The property was valued above resource limit allowed by the SSI programme. In 1988 the Secretary of Health and Education notified the claimant that her SSI benefits were being terminated because she owned resources in excess of the \$2000 limit applicable to an individual by the SSI programme.

The claimant protested against the termination of her benefits and requested a hearing from an administrative court. The Administrative law judge court found that the claimant's interest in the partnership was a resource which she would dispose off and which could support her. The claimant proceeded to the federal court to challenge the Secretary's termination of her SSI benefits. The federal court upheld the Administration Law Judge decision that the partnership was indeed a resource for the claimant.

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<sup>208</sup> See, generally, *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987).

<sup>209</sup> *Supra* (n 200) at 1

<sup>210</sup> 23 F.3d 752 (3rd Cir. 1994).

#### **4.2.9 The Difficulties in implementing the SSDI and the SSI Disability Programmes**

The administering of the SSDI and the SSI has proved to be a difficult challenge for the Social Security Administration. Many social security offices, particularly those in the urban areas are spending more time serving applicants for either the SSDI and the SSI disability benefits. The growing domination of the agency workloads by the disability programmes is not widely understood by policy makers and the public. The SSA has yet to emphasize this development in its public statements. These programmes have a significant impact on the agency's ability to serve the general public.<sup>211</sup>

Another problem with the disability benefit systems is the complex structure under which the programmes operate. The determination of an individual's disability is a judgment process in which different decision-makers will frequently have different views. Coupled with the above is the lack of consistency in decision making; unexplained changes in application allowance rates, the complexity, slowness and cost of the application and appeals process; the lack of confidence in the system; and the fact that few beneficiaries are successfully rehabilitated so that they can become part of the economic mainstream.<sup>212</sup>

The other challenge facing the disability programme is the average age of beneficiaries. Many younger people are seeking disability benefits and this heightens the concern about the weakness of the current disability programme in the United States. There are an increased proportion of individuals with mental impairments: half of the SSI applicants have a mental impairment. It is difficult to adduce evidence with regard to mental impairment because it involves complex psychological evaluations.<sup>213</sup>

#### **4.2.10. Conflict between the ADA objectives and the DBS (Disability Benefit system)**

The conflict between the DBS program and the ADA statute can be illustrated as follows: Consider a person with a disability who is faced with the choice of applying

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<sup>211</sup> Supra (n 200) at 3

<sup>212</sup> Supra (n 200) at 4

<sup>213</sup> Supra (n 200) at 4

for the DBS or going to work for an employer who will provide accommodation for a person to work because of the influence of the ADA. If the disabled person decides to go for the job, the chances are that the wage offered would be substantially greater than the disability benefit provided by the disability benefit program. Thus the difference is likely to offset the chances of the disabled person getting health coverage, for instance, in the case of chronic disease.

This example can further be illustrated by *Cleveland v. Policy Management Systems Corporation*.<sup>214</sup> The plaintiff suffered from a disabling stroke and lost her job. She sued her employer under the ADA and claimed that the employer had discriminated against on an account of her disability. The plaintiff however, had also been receiving SSDI benefits and she contended that she was totally disabled. The court was of the view that the claims of the ADA and the SSDI did not inherently conflict. The plaintiff was entitled to explain the discrepancy to reconcile it with her reasonable accommodation claims. In other words, even though she said that she was totally disabled she had to prove that she could work with reasonable accommodation under the ADA standards.

The court held that the two statutes could exist side by side. Since the decision in the *Cleveland case* many courts in the United States continue to struggle with the conflict between the two statutes. The issue that needs attention is whether it would be rational for a disabled person to forgo his disability benefit for a career if this cannot secure him or her health insurance.

In Conclusion, disability was first essentially a scheme of social welfare. The disability activists in America lobbied for the shift from welfare to a direct rights system. The enactment of the ADA and the Rehabilitation Act was a triumph for the disability activists, because the statutes incorporated that idea that the ability of people with disabilities to get jobs or access to training was limited by prejudice and structural barriers, rather than the effects of injury or illness. The principle of reasonable accommodation was incorporated into the two statutes for disabled individuals who were

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<sup>214</sup> see *Cleveland*, 526 U.S. at 795-796.

qualified to perform the essential functions of a job. The struggle continues for the implementation of better policies that will cater for the well-being of the disabled in the United States of America.

## **5. Conclusion**

Disabled people had for a long time been regarded as people in need of charitable assistance. The introduction of the quota system in Europe helped to provide quota schemes in places of employment for people with disabilities. It was believed that the lack of legislation for disabled persons would not enable them to get into the job market. Countries like the United States of America opted for the anti-discrimination approach. The disability activists advocated for a shift from the medical definition of disability to a social definition of disability.

Countries like South Africa, India and United States of America have since adopted either the medical or the social definition of disability. Disability definition and prevalence rates are not uniform in all the three countries. South Africa's definition is fragmented due to the different criteria and assessments regarding who is eligible for a disability grant. India defines disability based on the medical model. It classifies disability and every respective class is entitled to a right and a benefit. This medical definition is valid for the 3 per cent reservation in government and public sector employment. In the United States the SSDI and the SSI programmes define disability in medical terms while the ADA is associated with reasonable accommodation as a non-discrimination principle in the United States.

Legislation and policies have been implemented to include people with disabilities. For the rights of the disabled to be protected there is a need for continued political support by the governments to allocate sources for people with disabilities. The legislation should not only look good on paper but must be put to good use.

International organizations have also heeded to the plight of disabled persons. Disability can no longer be confined to the borders of one nation. Many disability organizations have emerged over the years and are representing the interests of the disabled.

From a global perspective, disability rights activists are advocating the return to social-welfare rather than the anti-discrimination laws. The return from anti-discrimination to social – welfare will enable disability activists to move beyond just demanding for antidiscrimination laws and seeking reasonable accommodation to demand rights and benefits that are due to people with disabilities.

## 6. Recommendations

The recommendations for each of the above countries vary in many aspects. In the case of the United States the future of disability will be dependent on the fact that the entitlement of health coverage of a disabled person be strictly independent of their employability or their eligibility to the Disability benefits.<sup>215</sup>

The entitlement would eliminate the conflict between the ADA and the SSDI. The entitlement will be enabling the enforcement of anti-discrimination policies designed to increase the employment of persons with disabilities.

There is also the need for the expansion of the job accommodation provisions of the ADA for persons in the disabled minority. There is need to expand information on the nature and costs of workplace accommodations. It would also be a great encouragement to the people with disabilities if health coverage be provided to persons with disabilities regardless of their employment status.<sup>216</sup>

In the case of the Disability benefit systems in the United States: Despite all the shortcomings.

The social Security Administration enforcing the SSDI and the SSI should provide appropriate guidance to those responsible for determining whether the individual is disabled and must insist on systematic updating of the listing of medical impairments of the vocational standards used to evaluate whether the individual has an impairment that prevents any substantial work.<sup>217</sup> Disability claimants should be provided with better understanding of programme requirements and procedures and improve the development of claims as part of the initial disability interview process.

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<sup>215</sup> Johnson (n 191) at 172

<sup>216</sup> Johnson (n 191) at 172

<sup>217</sup> Supra (n-200) at 12



Both India and South Africa have the majority of people with disabilities living in the rural areas. Poverty alleviation programmes are essential to provide resources to the disabled. This would mean the involvement of disabled people to improve their standard of living.<sup>218</sup> There is need for information about disability to be taken especially to the rural areas so that people with disabilities can be educated about the policies and legislation to protect their rights.

Although, there are policies advocating for the inclusion of disabled people in India these policies should encourage greater participation, representation and involvement of disabled people in the decision and policy-making bodies. The Existing legislation in India needs to be effectively implemented and resources must be allocated to make sure that the quality of people with disabilities is improved.<sup>219</sup>

There should be an urgent need to educate political parties about disability awareness and policy. People with disabilities are often politically invisible. People with disabilities should be politically represented within public institutions and their representative should be accountable to people with disabilities.

With the above recommendations, one of the most important issues would be the allocation of resources. These resources can be used to implement fundamental changes in the legislature and government of the above countries. Each of these countries has to prioritize disability through continuous leadership training and education. The views and attitudes on disability have changed through out the years and the rights of the disabled persons have to be addressed accordingly.

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<sup>218</sup> Mitra (n 200) at 13

<sup>219</sup> [www.disabilityworld.org/01-02\\_01/gov/legislation.htm](http://www.disabilityworld.org/01-02_01/gov/legislation.htm) accessed 2006/01/25

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 National Trust for Welfare of persons with Autism, Cerebral palsy, Mental Retardation  
 and Multiple Disabilities Act of 1999  
 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000  
 Rehabilitation Council of India Act of 1992  
 Road Accident Fund Act 56 of 1996  
 The Persons with Disabilities (Equal Opportunities Protection of Rights and Full  
 Participation) Act of 1995.



